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Emergency Rules Now in Effect

Under s. 227.24, Stats., state agencies may promulgate rules without complying with the usual rule-making procedures. Using this special procedure to issue emergency rules, an agency must find that either the preservation of the public peace, health, safety or welfare necessitates its action in bypassing normal rule-making procedures.

Emergency rules are published in the official state newspaper, which is currently the Wisconsin State Journal. Emergency rules are in effect for 150 days and can be extended up to an additional 120 days with no single extension to exceed 60 days.

Occasionally the Legislature grants emergency rule authority to an agency with a longer effective period than 150 days or allows an agency to adopt an emergency rule without requiring a finding of emergency.

Extension of the effective period of an emergency rule is granted at the discretion of the Joint Committee for Review of Administrative Rules under s. 227.24 (2), Stats.

Notice of all emergency rules which are in effect must be printed in the Wisconsin Administrative Register. This notice will contain a brief description of the emergency rule, the agency finding of emergency or a statement of exemption from a finding of emergency, date of publication, the effective and expiration dates, any extension of the effective period of the emergency rule and information regarding public hearings on the emergency rule.

Copies of emergency rule orders can be obtained from the promulgating agency. The text of current emergency rules can be viewed at www.legis.state.wi.us/rsb/code.

Beginning with rules filed with the Legislative Reference Bureau in 2008, the Legislative Reference Bureau will assign a number to each emergency rule filed, for the purpose of internal tracking and reference. The number will be in the following form: EmR0801. The first 2 digits indicate the year of filing and the last 2 digits indicate the chronological order of filing during the year.

Agriculture, Trade and Consumer Protection (2)

1. **EmR0913** — Rule adopted revising s. **ATCP 21.17**, relating to the quarantines of Brown County and Kenosha County for emerald ash borer.

Finding of Emergency

On July 24, 2009, APHIS identified emerald ash borer in Brown County. On August 12, 2009, APHIS identified emerald ash borer in Kenosha County. Emerald ash borer is an exotic pest that poses a dire risk to the ash forest. When APHIS declares quarantine, DATCP has regulatory authority for import controls and quarantine for emerald ash borer under ATCP 21.17. It is anticipated that APHIS will declare quarantines for Brown County and Kenosha County but that it will take up to six weeks for APHIS to act. A six week delay until enactment of the federal quarantines leaves too much time for businesses or individuals to move potentially emerald ash borer infested material out of the county to areas

of Wisconsin or other states that are not infested with emerald ash borer.

DATCP is adopting this rule as a temporary emergency rule, pending completion of federal quarantine regulations. DATCP does not anticipate completing a permanent rule.

Publication Date: August 22, 2009
Effective: August 22, 2009 through January 18, 2010
Hearing Dates: September 29 and 30, 2009

2. **EmR0922** — Rule adopted revising s. **ATCP 21.17**, relating to the quarantines of Milwaukee County, Racine County and Waukesha County for emerald ash borer.

Finding of Emergency

On August 28, 2009, APHIS identified emerald ash borer in Milwaukee County, near the borders of Racine County and Waukesha County. Emerald ash borer is an exotic pest that poses a dire risk to the ash forest. When APHIS declares quarantine, DATCP has regulatory authority for import controls and quarantine for emerald ash borer under ATCP 21.17. It is anticipated that APHIS will declare quarantines for Milwaukee County, Racine County and Waukesha County but that it will take up to six weeks for APHIS to act. A six week delay until enactment of the federal quarantines leaves too much time for businesses or individuals to move potentially emerald ash borer infested material out of the county to areas of Wisconsin or other states that are not infested with emerald ash borer.

DATCP is adopting this rule as a temporary emergency rule, pending completion of federal quarantine regulations. DATCP does not anticipate completing a permanent rule.

Publication Date: September 14, 2009
Effective: September 14, 2009 through February 10, 2010
Hearing Date: October 15, 2009

Children and Families

Safety and Permanence, Chs. DCF 37–59

- EmR0937** — Rule adopted revising **Chapters DCF 56 and 58**, relating to foster care and kinship care.

Finding of Emergency

The Department of Children and Families finds that an emergency exists and that an emergency rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. A statement of facts constituting the emergency is:

2009 Wisconsin Act 28 assumes that court-ordered kinship care relatives will be applying for a license to operate a foster home beginning after January 1, 2010, and continuing throughout 2010. This rule creates the first two levels of the new levels of care system for foster care. The newly-licensed kinship care relatives will be incorporated into the foster care program. Licensing these relatives will allow the state to claim an additional \$6.5 million in Title IV-E funds for 2010. Act 28 appropriates this \$6.5 million to be expended in 2011.

Publication Date: December 30, 2009
Effective: January 1, 2010 through
 May 30, 2010

Commerce

Fee Schedule, Ch. Comm 2

EmR0934 — Rule adopted revising **Chapter Comm 2**, relating to public swimming pool and water attraction plan review and inspection fees.

Finding of Emergency

The Department of Commerce finds that an emergency exists within the state of Wisconsin and that adoption of an emergency rule is necessary for the immediate preservation of the public health, safety and welfare. A statement of the facts constituting the emergency is as follows.

1. Implementation of the federal Virginia Graeme Baker Pool and Spa Safety Act necessitates most existing public swimming pools and water attractions to undergo physical modifications to reduce the risk of entrapment at suction outlets.
2. The Virginia Graeme Baker Pool and Spa Safety Act has a compliance date of December 19, 2008.
3. The department estimates that 3,700 existing pools and water attractions will need to be modified in order to comply with the federal act. As of December 1, 2009, approximately 1,800 pool modifications have been submitted to the department for review and approval.
4. There are claims that the availability of parts to make the necessary modifications is limited.
5. The current department plan review fees and inspection fees under s. Comm 2.68 reflect an estimated average time and cost to provide those services. For the types of pool and water attraction modifications necessary to comply with the Virginia Graeme Baker Pool and Spa Safety Act, the department believes that the time and cost to provide the service will be below the averages reflected under the current fee structure of section Comm 2.68.
6. The department believes that a fee reduction to facilitate plan review and inspection relative to the Virginia Graeme Baker Pool and Spa Safety Act is in alignment with the direction provided under s. 101.19, Stats., of keeping fees consistent with the costs of providing service.

Publication Date: January 1, 2010
Effective: January 1, 2010 through
 May 30, 2010
Hearing Date: January 21, 2010

Commerce

Uniform Dwelling, Chs. Comm 20–25

EmR0917 — Rule adopted revising **Ch. Comm 22**, relating to energy conservation.

Finding of Emergency

The Department of Commerce finds that an emergency exists within the state of Wisconsin and that adoption of an emergency rule is necessary for the immediate preservation of the public health, safety and welfare. A statement of the facts constituting the emergency is as follows.

1. Recently, chapter Comm 22, relating to energy conservation, was repealed and recreated to bring the Wisconsin requirements in line with the national model energy code. Effective April 1, 2009, chapter Comm 22 incorporates new prescriptive requirements that apply to individual components such as walls, windows, skylights, doors and ceilings. Within that subsection is section Comm 22.31 (2) (a), that allows the use of a “total dwelling thermal envelope” method, and (2) (b), that allows the use of REScheck software, version 4.1.0, or later, to calculate compliance with the Uniform Dwelling Code thermal envelope requirements.

2. The U.S. Department of Energy’s Building Energy Codes Program develops and distributes REScheck software. The software program simplifies and clarifies residential code compliance with the Model Energy Code (MEC) and the International Energy Conservation Code (IECC). REScheck software makes it easier for designers, builders, product manufacturers and code officials to comply with energy codes based on the IECC or ASHRAE/IESNA Standard 90.1 requirements. Also, REScheck can be tailored to meet state-specific codes.

3. The department included the REScheck software edition requirement in anticipation that Version 4.1.0 would be compatible with the current code. Working with Pacific Northwest Laboratories, who contracts with the U.S. Department of Energy to develop the REScheck software, the department developed state-specific energy calculations that were not incorporated into REScheck software until Version 4.2.2. The calculations that reflect the current code are identified in the software as “Wisconsin 2009.” Versions prior to 4.2.2 do not have the code choice “Wisconsin 2009.”

4. Previous versions of REScheck, including Version 4.1.0, do not meet nor support the requirements of Wisconsin’s current energy code. In fact, Version 4.1.0 includes other values, such as gross wall trade-offs and appliance credits that are not included in chapter Comm 22 that became effective April 1, 2009.

5. The department recognizes that without promulgating this emergency rule, there would be confusion and miscalculations surrounding the use of Version 4.1.0 and other previous and out-of-date versions of REScheck software to calculate compliance with Uniform Dwelling Code thermal envelope requirements.

Publication Date: September 5, 2009
Effective: September 5, 2009 through
 February 1, 2010
Hearing Date: October 21, 2009

Commerce (2)

Financial Resources for Businesses and Communities, Chs. Comm 104—

1. **EmR0910** — Rule adopted to create **Chapter Comm 100**, relating to tax benefits for job creation, capital investment, employee training, and corporate headquarters.

Exemption From Finding of Emergency

The Legislature, by section 9110 (4) in 2009 Wisconsin Act 2, exempts the Department from providing evidence that this emergency rule is necessary for the preservation of the public peace, health, safety or welfare; and exempts the Department from providing a finding of emergency for the adoption of this rule.

Publication Date: June 30, 2009
Effective: June 30, 2009 through July 1, 2010 or the date permanent rules take effect, whichever is sooner
Hearing Date: September 15, 2009

2. **EmR0931** — Rule adopted creating Chapter Comm 136, relating to midwestern disaster area bonds.

Finding of Emergency

The Department of Commerce finds that an emergency exists and that an emergency rule is necessary for the immediate preservation of public welfare. The facts constituting the emergency are as follows.

Between June 14 and July 9, 2008, thirty Wisconsin counties were declared major disaster areas by the President as a result of severe storms, tornados or flooding in 2008 that caused extensive damage to communities, residents, businesses, the economy and critical infrastructure. Subsequently, the federal Heartland Disaster Tax Relief Act of 2008 was enacted, authorizing the Governor of Wisconsin to designate up to \$3,830,112,000 in Qualified Midwestern Disaster Area Bonds, which must be issued before January 1, 2013, for the purpose of encouraging economic development and recovery in the 30 counties.

To implement the provisions this federal Act, Governor Jim Doyle issued Executive Order #288, directing the Department to promulgate rules for allocating Wisconsin's Qualified Midwestern Disaster Area Bonding Authority, and including the necessary provisions to ensure that bonds are allocated to eligible projects on the basis of providing assistance to areas in the order in which the assistance is most needed. This rule is the result of that directive.

Publication Date: November 9, 2009
Effective: November 9, 2009 through April 7, 2010
Hearing Date: January 25, 2010
 (See the Notice in this Register)

Corrections (2)

1. **EmR0920** — Rule adopted revising s. **DOC 309.466**, relating to inmate release accounts.

Finding of Emergency

The Department of Corrections finds that an emergency exists and that an emergency rule is necessary for the immediate preservation of public peace, health, safety and welfare. A statement of facts constituting the emergency is:

Under 2009 WI Act 28, an increased number of inmates are being considered for release. In addition, the department has developed a number of release initiatives to address an inmate's successful transition from incarceration to community life. As part of those initiatives, there are costs associated with that transition, including acquiring housing, employment, and transportation. For example, an inmate must have a social security card, a driver's license or state identification card, the first months rent and security deposit for an apartment, and civilian clothing.

Under the current rule, an inmate may only use release account funds for "adequate clothing for release" and for "out-of-state release transportation." In addition, the rule

limits the maximum amount of money which can be saved in the release account to \$500.00. The emergency rule immediately permits the use of release account money for a wide variety of purchases, including fees associated with obtaining a driver's license or state identification card, housing, and a mode of transportation (bus tickets, vehicle, bicycle, etc.). In the past the Department has borne some of these costs, despite an inmate having the money in his or her release account. Given the initiatives of reentry and release, an inmate should be responsible for these expenditures.

In addition, the emergency rule raises the limit on release accounts from \$500.00 to \$5,000.00. Since the current limit was established, the cost of living in the community has risen. The department seeks this change to reflect the significant costs of housing, transportation, and food and other necessities.

If the rule is not created promptly and immediately, the department will not be able to use inmate release account funds to pay for items which inmates need in preparation for their release to the community. The purpose of the emergency rule is to permit inmates to use release account funds for a greater range of expenditures related to their release from incarceration and transition back into the community. The permanent rule process has been started. However, the permanent rule process will take approximately nine months to complete. Emergency rules are necessary to respond promptly to the need to use inmate funds, not state funds, while permanent rules are being developed.

Publication Date: September 10, 2009
Effective: September 10, 2009 through February 6, 2010
Hearing Date: October 14, 2009

2. **EmR0939** — Rule adopted revising **Chapter DOC 302**, relating to sentence calculations and prison release and to administrative review of inmate classification decisions.

Finding of Emergency

The Department of Corrections finds that an emergency exists and that emergency rules are necessary for the immediate preservation of public peace, health, safety and welfare. A statement of facts constituting the emergency is:

Under 2009 Wisconsin Act 28, the legislature provides for the release of inmates from prison if certain criteria are met. The Department is responsible for implementing several of those procedures. Specifically, the department is responsible for implementing the early release programs under: (1) s PAT (2) ERP/CIP (3) CER (4) Risk reduction (5) 75%/85%. In addition, the department is revising section 302.18 to facilitate the review of inmates for purposes of early release.

If the rule is not created promptly and immediately, the Department will not be able to proceed in reviewing inmates under these various release procedures. This could result in significant delay in the implementation of the statutory provisions which will negatively impact the ability of the Department to manage the inmate population in a safe and effective manner. In addition, a delay will affect the management and control of inmate population levels of correctional facilities with the resources necessary to maintain public safety.

The purpose of the emergency rule is to implement newly created statutory provisions providing for release of inmates under specified circumstances. The permanent rule process has been started. However, the permanent rule process will take approximately nine months to complete. Emergency rules are necessary for a prompt implementation of the legislative mandates concerning the release of inmates meeting established criteria while the permanent rules are being developed.

Publication Date: December 31, 2009
Effective: December 31, 2009
 through May 29, 2010
Hearing Date: February 25, 2010
 (See the Notice in this Register)

Earned Release Review Commission

(Formerly Parole Commission)

EmR0940 — Rule adopted revising **Chapter PAC 1**, relating to the release of inmates through parole or other procedures.

Finding of Emergency

The Wisconsin Earned Release Review Commission finds that an emergency exists and that emergency rules are necessary for the immediate preservation of public peace, health, safety and welfare. A statement of facts constituting the emergency is:

Under 2009 Wisconsin Act 28, the legislature provides for the release of inmates from prison if certain criteria are met. The Earned Release Review Commission (formerly the Parole Commission) is responsible for implementing several of those procedures. Specifically, the commission is responsible for considering the early release of inmates under: (1) section 304.06 (1) (bg)1. and 2., Stats., after the inmate has served the term of confinement of their bifurcated sentence less positive adjustment time, (2) section 304.06 (1) (bg) 3. and 4., Stats., after the inmate has served either 75 % or 85 % of their term of confinement, depending on the offense for which the inmate was sentenced, and (3) section 302.1135 (2) (a), (b), and (c), Stats., based on age or extraordinary health.

If the rule is not created promptly and immediately, the commission will not be able to proceed in reviewing inmates under these various release procedures. This could result in significant delay in the implementation of the statutory provisions which will negatively impact the ability of the department of corrections to manage the inmate population in a safe and effective manner. In addition, a delay will affect the management and control of inmate population levels of correctional facilities with the resources necessary to maintain public safety.

The purpose of the emergency rule is to implement newly created statutory provisions providing for release of inmates under specified circumstances. The permanent rule process has been started. However, the permanent rule process will take approximately nine months to complete. Emergency rules are necessary to respond to the legislatively recognized need to review inmates who meet the requirements under the statutes for potential release while the permanent rules are being developed.

Publication Date: December 31, 2009
Effective: December 31, 2009
 through May 29, 2010
Hearing Date: February 23, 2010
 (See the Notice in this Register)

Employee Trust Funds

EmR0938 — Rule adopted revising **Chapters ETF 10, 20 and 40**, relating to the implementation of benefit changes mandated in 2009 Wisconsin Act 28; specifically, domestic

partner benefits and the expansion of health insurance coverage to adult dependents up to the age of 27 years.

Finding of Emergency

The Department of Employee Trust Funds finds that an emergency exists and that emergency rules are necessary for the immediate preservation of the public peace, health, safety, or welfare. A statement of the facts constituting the emergency is:

ETF cannot promulgate a permanent rule in compliance with the mandated changes by January 1, 2010, which is the effective date of the domestic partnership and the health insurance provisions of 2009 Wisconsin Act 28. Without an emergency rule in place, the ability of ETF to enroll and cover participants' domestic partners and to provide health insurance to adult dependents would be seriously impaired. ETF would be unable to provide health insurance and other benefits to domestic partners and adult dependents.

Publication Date: December 28, 2009
Effective: January 1, 2010
 through May 30, 2010
Hearing Date: February 12, 2010
 (See the Notice in this Register)

Health Services

*Medical Assistance, Chs. DHS 101—
 Health, Chs. DHS 110—*

EmR0932 — Rule adopted revising **Chapters DHS 105, 106 and 133**, relating to personal care agencies and providers, and affecting small businesses.

Exemption From Finding of Emergency

The legislature by 2009 Wis. Act 28, Section 9122 (2), provides an exemption from a finding of emergency to adopt these emergency rules.

Publication Date: December 16, 2009
Effective: December 16, 2009
 through May 14, 2010
Hearing Date: February 3, 2010

Health Services

Health, Chs. DHS 110—

EmR0928 — Rule adopted to revise **Chapter DHS 163**, relating to requirements for conducting lead-safe renovation activities in pre-1978 housing and child-occupied facilities, and affecting small businesses.

Finding of Emergency

The Department of Health Services (department) finds that an emergency exists and that the adoption of an emergency rule is necessary for the continuity of regulations relating to lead hazard exposure in Wisconsin. The facts constituting the emergency are as follows:

Under ch. DHS 163, the department, as Wisconsin's public health agency, regulates lead hazard reduction and lead management activities in pre-1978 housing (target housing) and child-occupied facilities. The rules include standards for certification of individuals and companies conducting these activities, accreditation of lead training courses and approval of instructors, and work practices. In addition to the department's authority under chs. 250 and 254, Stats., to regulate lead hazards, the department has authorization from

the Environmental Protection Agency (EPA) to regulate lead hazard reduction and management activities in lieu of the EPA administering federal regulations in Wisconsin.

On April 22, 2008, the EPA issued rules under 40 CFR 745 to establish requirements for training renovators, other renovation workers, and dust sampling technicians; for certifying renovators, dust sampling technicians, and renovation firms; for accrediting providers of renovation and dust sampling technician training; and for renovation work practices (and associated recordkeeping requirements) that disturb paint in target housing and child-occupied facilities. Under the EPA regulations, beginning on April 22, 2010, persons who perform renovation activities for compensation, including repair and painting activities, that disturb paint in target housing and child-occupied facilities must be certified, properly trained, and follow specific work practices to prevent lead contamination. The EPA will begin accepting applications for certification from individuals and companies on October 22, 2009.

States that promulgate rules that conform to the EPA standards on or before October 22, 2009, may accept applications for certification in lieu of the EPA. Otherwise, on October 22, 2009, the EPA will begin accepting these applications and the associated fees from Wisconsin companies and individuals. Such an occurrence may cause confusion among the regulated community and property owners, and would impede the department's ability to continue to administer a viable lead hazard reduction program if covered persons begin complying with the EPA certification requirements before state requirements are implemented. Promulgating rules before October 22, 2009, will help to avoid any unnecessary complexity for covered persons that may be caused by overlapping state and federal regulations that address lead-based paint hazards in target housing and child-occupied facilities.

Publication Date: October 16, 2009
Effective: October 19, 2009
 through March 17, 2010
Hearing Date: November 18, 2009

Insurance (6)

1. **EmR0918** — Rule adopted to revise **Chapter Ins 6**, relating to exempting commercial umbrella and commercial liability policies covering only hired and non-owned autos from having to offer or include uninsured and underinsured motorist coverage.

Finding of Emergency

The Commissioner of Insurance finds that an emergency exists and that an emergency rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. Facts constituting the emergency are as follows:

Act 28 (2009) modified the requirements for auto insurance in Wisconsin. Most of these new provisions go into effect on November 1, 2009. These modifications did not specifically address the issue of insurers who write commercial liability insurance and commercial umbrella policies which insure only hired and non-owned automobiles ("HNO") under the policy but do not insure any automobiles owned by the insured.

If these new Act 28 requirements apply to commercial liability insurance and commercial umbrella policies which insure only hired and non-owned automobiles ("HNO") under the policy, this creates a significant problem. Some of

these insurers do not have authority to write auto insurance which is needed to write uninsured ("UM") and underinsured coverage ("UIM"). Other insurers offering the commercial umbrella and commercial liability HNO have not ever written UM/UIM coverages because the current rules exempt them. Insurers have also stated that obtaining reinsurance for this is a problem.

This issue was addressed in 1997 when an emergency rule was promulgated and modifications to Ins 6.77 were enacted in response to various court cases. In that process, commercial insurers who wrote liability policies that covered only HNO were exempted from the requirement to offer or include UM/UIM coverage. This emergency rule would continue this exemption so that the market for commercial liability insurance and commercial umbrella policies is not disrupted.

Publication Date: September 9, 2009
Effective: November 1, 2009 through
 March 30, 2010
Hearing Date: December 8, 2009

2. **EmR0923** — Rule adopted to create **section Ins 3.36**, Wis. Adm. Code, relating to treatment of autism spectrum disorders and affecting small business.

Exemption From Finding of Emergency

The Commissioner of Insurance pursuant to s. 632.895 (12m) (f) 2., Stats., need not find that an emergency exists nor provide evidence that promulgating a rule is necessary for the preservation of the public peace, health, safety or welfare.

Specifically, s. 632.895 (12m) (f), Wis. Stats., requires the commissioner to define "intensive-level services," "nonintensive-level services," "paraprofessional," and "qualified" for purposes of providing services under this subsection. The statute further authorizes that the commissioner may promulgate rules governing the interpretation or administration of this subsection.

Publication Date: September 26, 2009
Effective: September 26, 2009
 through February 22, 2010
Hearing Date: December 2, 2009

3. **EmR0925** — Rule adopted to create **section Ins 3.75**, relating to continuation of group health insurance policies.

Exemption From Finding of Emergency

Under 2009 Wisconsin Act 11, section 9126, a Finding of Emergency is not required for this emergency rule. The relevant portion of 2009 Act 11 reads as follows:

2009 Wisconsin Act 11, SECTION 9126. Nonstatutory provisions; Insurance.

(4) CONTINUATION COVERAGE RULES. (a) Notwithstanding section 632.897 of the statutes and subsections (1), (2), and (3), the commissioner of insurance may promulgate rules establishing standards requiring insurers to provide continuation of coverage for any individual covered at any time under a group policy who is a state eligible individual to whom subsection (2) or (3) applies or an assistance eligible individual, as defined under section 3001 (a) (3) of the federal act, including rules governing election or extension of election periods, notice, rates, premiums, premium payment, application of preexisting condition exclusions, and election of alternative coverage.

(b) The commissioner may promulgate the rules under paragraph (a) as emergency rules under section 227.24 of the statutes. Notwithstanding section 227.24 (1) (c) of the

statutes, emergency rules promulgated under this paragraph may remain in effect for one year and may be extended under section 227.24 (2) of the statutes. Notwithstanding section 227.24 (1) (a) and (3) of the statutes, **the commissioner is not required to provide evidence that promulgating a rule under this paragraph as an emergency rule is necessary for the preservation of public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this paragraph.** [Emphasis Added]

Publication Date: October 1, 2009
Effective: October 2, 2009
 through October 1, 2010
Hearing Date: December 8, 2009

4. **EmR0927** — Rule adopted to create **Chapter Ins 57**, relating to care management organizations and affecting small business.

Finding of Emergency

The Commissioner of Insurance finds that an emergency exists and that an emergency rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. Facts constituting the emergency are as follows:

Beginning January 1, 2010, care management organizations are required to obtain a permit from the commissioner to provide services under the Family Care program. In order to ensure no gap in services to enrollees, organizations and the office need to complete and accept applications for permits prior to January 1, 2010. Promulgation of this rule will permit the timely filing and review of permittees.

Publication Date: October 9, 2009
Effective: October 10, 2009
 through March 10, 2010
Hearing Date: December 3, 2009

5. **EmR0930** — Rule adopted to create **section Ins 3.34**, relating to insurance coverage of dependents to age 27 and affecting small business.

Finding of Emergency

The Commissioner of Insurance finds that an emergency exists and that an emergency rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. Facts constituting the emergency are as follows: the Commissioner is aware that insurers, employers and consumers are interpreting the state mandate inconsistently so without this rule consumers will not be treated similarly when the law becomes effective on January 1, 2010; the Commissioner has received numerous inquiries from insurers, consumers and employers seeking clarity of terms and guidance on interpretation and implementation of the law as many employers are entering open enrollment for the 2010 plan year.

These changes will be effective the day following publication in the official state newspaper and a permanent rule will start the permanent rule process to achieve uniformity in interpretation therefore protecting the public, informing employers, and guiding insurers in the state.

Publication Date: October 30, 2009
Effective: October 31, 2009 through
 March 29, 2010
Hearing Date: January 14, 2010

6. **EmR0945** — Rule adopted revising **section Ins 3.75**, relating to the continuation of group health insurance policies.

Exemption From Finding of Emergency

Under 2009 Wisconsin Act 11, section 9126, a Finding of Emergency is not required for this emergency rule. The relevant portion of 2009 Act 11 reads as follows:

2009 Wisconsin Act 11, SECTION 9126. Nonstatutory provisions; Insurance.

(4) CONTINUATION COVERAGE RULES (a) Notwithstanding section 632.897 of the statutes and subsections (1), (2), and (3), the commissioner of insurance may promulgate rules establishing standards requiring insurers to provide continuation of coverage for any individual covered at any time under a group policy who is a state eligible individual to whom subsection (2) or (3) applies or an assistance eligible individual, as defined under section 3001 (a) (3) of the federal act, including rules governing election or extension of election periods, notice, rates, premiums, premium payment, application of preexisting condition exclusions, and election of alternative coverage.

(b) The commissioner may promulgate the rules under paragraph (a) as emergency rules under section 227.24 of the statutes. Notwithstanding section 227.24 (1) (c) of the statutes, emergency rules promulgated under this paragraph may remain in effect for one year and may be extended under section 227.24 (2) of the statutes Notwithstanding section 227.24 (1) (a) and (3) of the statutes, **the commissioner is not required to provide evidence that promulgating a rule under this paragraph as an emergency rule is necessary for the preservation of public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this paragraph.** [Emphasis Added]

Publication Date: January 7, 2010
Effective: January 8, 2010
 through June 6, 2010

Natural Resources

Fish, Game, etc., Chs. NR 1—

- EmR0914** — Rule adopted to revise **Chapter NR 10**, relating to hunting and the 2009 migratory game bird seasons and waterfowl hunting zones.

Finding of Emergency

The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public welfare. The federal government and state legislature have delegated to the appropriate agencies rule-making authority to control the hunting of migratory birds. The State of Wisconsin must comply with federal regulations in the establishment of migratory bird hunting seasons and conditions. Federal regulations are not made available to this state until mid-August of each year. This order is designed to bring the state hunting regulations to conformity with the federal regulations. Normal rule-making procedures will not allow the establishment of these changes by September 1. Failure to modify our rules will result in the failure to provide hunting opportunity and continuation of rules which conflict with federal regulations.

Publication Date: August 22, 2009
Effective: September 1, 2009 through
 January 28, 2010
Hearing Date: November 4, 2009

Natural Resources

Environmental Protection — Water Regulation, Chs. NR 300—

EmR0915 — A rule adopted revising **Chapters NR 335 and 336**, relating to grants for dam maintenance, repair, modification, or abandonment and removal.

Finding of Emergency

The substantial increase in bonding for the dam grant programs is a strong message from the legislature that concern for public welfare from unsafe dams is growing, as well as the desire to help dam owners, including the owners of the many dams damaged during the flooding in 2007 and 2008. In order to protect the public and provide this financial assistance, these additional funds should be put to work as soon as possible. The timeline for permanent rule promulgation will impede the Department's ability to accept applications and commit funding to dam safety projects until at least June 2010, which would delay most projects until late 2010 or 2011. The emergency rules will allow immediate implementation of modifications that will allow a grant application cycle to be conducted yet this fall and allow most projects to be constructed during the 2010 construction season or before.

Publication Date: August 28, 2009
Effective: August 28, 2009 through
 January 24, 2010

Public Defender Board

EmR0926 — Rule adopted to create **Chapter PD 8**, Discovery Payments, relating to the maximum fees that the state public defender may pay for copies of discovery materials in criminal proceedings, proceedings under Chapter 980, Wis. Stats., and other proceedings in which the state public defender provides legal representation.

Finding of Emergency

These rules are promulgated under s. 227.24 (1) (a), Stats., because the magnitude of the shortfall in the state public defender's appropriation for transcripts, discovery, and interpreters in both years of the current biennium constitutes an emergency that requires implementation of a rule earlier than a permanent rule could take effect if the agency were to comply with the applicable notice, hearing, legislative-review, and publication requirements.

The state public defender was initially provided a base budget of \$60,000 in 1995 for discovery payments, which at that time consisted mostly of photocopies and some photographs. In the 1999–2001 budget act, this appropriation was increased to \$150,000, based on a presumptive rate for photocopies of \$0.20 per page. In the 2001–2003 biennial budget act, this appropriation was subjected to a five percent funding reduction, leaving a base budget for discovery payments of \$142,500.

The public defender received discovery bills totaling \$717,000 for the fiscal year that ended June 30, 2009. Although discovery costs are caseload driven, this represents a nearly five-fold increase since 2001 and is due primarily to two factors. First, in the past many counties and municipalities did not bill the state public defender for copies of discovery materials. Because local budgets have come under increasing pressure, most now do so. Second, 2005 Wisconsin Act 60 resulted in more widespread use of audio

and video recordings of interrogations by law enforcement, copies of which must be provided to the defense.

The public defender board's requests for cost-to-continue budget increases for discovery payments in 2007–2009 and in 2009–2011 were not funded. Instead, the FY 2009–2011 budget act reduced this appropriation by 1%, leaving a base budget of \$141,100, and directed the board to promulgate rules to address the funding shortfall.

Publication Date: October 3, 2009
Effective: October 3, 2009 through
 March 1, 2010
Hearing Date: November 16, 2009

Public Instruction (4)

1. **EmR0916** — A rule adopted revising **ss. PI 35.03 and 35.05**, relating to establishing a fee under the Milwaukee Parental Choice Program.

Exemption From Finding of Emergency

Pursuant to Section 9139 (3) of the nonstatutory provisions of 2009 Wisconsin Act 28, the Department of Public Instruction is not required to provide evidence that this rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency.

Publication Date: September 1, 2009
Effective: September 1, 2009 through
 January 28, 2010

(Except Section 1)

Effective: October 1, 2009 through
 February 27, 2010
Hearing Date: October 26, 2009

2. **EmR0921** — Rule adopted to create **Chapter PI 15**, relating to revenue limit exemptions for energy efficiencies.

Exemption From Finding of Emergency

Pursuant to Section 9139 (2x) of the nonstatutory provisions of 2009 Wisconsin Act 28, the Department of Public Instruction is not required to provide evidence that this rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency.

Publication Date: September 4, 2009
Effective: September 4, 2009 through
 January 31, 2010
Hearing Date: November 9, 2009

3. **EmR0933** — Rule adopted to create **Chapter PI 39**, relating to grants for tribal language revitalization.

Finding of Emergency

The Department of Public Instruction finds that an emergency exists and that the adoption of an emergency rule is necessary for the immediate preservation of the public welfare. The facts constituting the emergency are as follows:

The tribal language revitalization grant program under s. 115.745, Stats., was created under 2009 Wisconsin Act 28. The Act became effective June 30, 2009, and appropriated \$247,500 annually beginning in the 2009–10 school year. In order for school districts to develop applications and for the department to review the applications and grant awards in

time for the program to operate in the second semester of the school year, rules must be in place as soon as possible to establish application criteria and procedures.

Publication Date: December 15, 2009
Effective: December 15, 2009
 through May 13, 2010
Hearing Date: January 15, 2010

4. **EmR0936** — Rule adopted to create **section PI 8.01 (4)**, relating to waiver of school hours.

Finding of Emergency

The Department of Public Instruction finds that an emergency exists and an emergency rule is necessary for the immediate preservation of the public welfare. The facts constituting the emergency are as follows:

2009 Wisconsin Act 42 requires the department to promulgate rules establishing criteria for waiving the requirement to schedule at least the number of hours of direct pupil instruction specified under s. 121.02 (1) (f) 2. if school is closed for a reason specified in s. 115.01 (10) (a) 2. or 3. The Act became effective October 21, 2009. Therefore, rules must be in place as soon as possible to establish the waiver procedure and criteria for the current school year.

Publication Date: December 21, 2009
Effective: December 21, 2009
 through May 19, 2010
Hearing Date: February 1, 2010

(See the Notice in this Register)

Public Service Commission

EmR0919 — Rule adopted to create **Chapter PSC 172**, relating to the police and fire protection fee created under 2009 Wisconsin Act 28.

Finding of Emergency

The Commission finds that an emergency exists and that an emergency rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. The police and fire protection fee, which must go into effect September 1, 2009, (2009 Wisconsin Act 28 section 9441) will be used to replace shared revenue payments for such services. To ensure the public peace, health, safety, and welfare of the citizens of Wisconsin, it is vital for funding of police and fire protection services to continue smoothly, quickly, and unimpeded. Thus, it is necessary for the rule administering the fee to be implemented as soon as possible.

Publication Date: September 11, 2009
Effective: September 11, 2009
 through February 7, 2010
Hearing Date: December 2, 2009

Regulation and Licensing (2)

1. **EmR0827** — Rule adopted creating **s. RL 91.01 (3) (k)**, relating to training and proficiency in the use of automated external defibrillators for certification as a massage therapist or bodyworker.

Exemption From Finding of Emergency

Section 41 (2) (b) of the nonstatutory provisions of 2007 Wisconsin Act 104 provides that notwithstanding section 227.24 (1) (a) and (3) of the statutes, the department of regulation and licensing is not required to provide evidence that promulgating a rule as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated to implement 2007 Wisconsin Act 104. Notwithstanding s. 227.24 (1) (c) and (2) of the statutes, these emergency rules will remain in effect until the date on which the final rules take effect.

Publication Date: September 10, 2008
Effective: September 10, 2008
 through the date on which
 the final rules take effect
Hearing Dates: November 26, 2008
 April 13, 2009

2. **EmR0828** — Rules adopted to **amend s. RL 181.01 (2) (c); and to create ss. RL 180.02 (1m), (3m) and (11), 181.01 (1) (d), (2) (c) 1. and 2.**, relating to training and proficiency in the use of automated external defibrillators for licensure as a licensed midwife.

Exemption From Finding of Emergency

Section 41 (2) (b) of the nonstatutory provisions of 2007 Wisconsin Act 104 provides that notwithstanding section 227.24 (1) (a) and (3) of the statutes, the department of regulation and licensing is not required to provide evidence that promulgating a rule as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated to implement 2007 Wisconsin Act 104. Notwithstanding s. 227.24 (1) (c) and (2) of the statutes, these emergency rules will remain in effect until the date on which the final rules take effect.

Publication Date: September 10, 2008
Effective: September 10, 2008
 through the date on which
 the final rules take effect
Hearing Date: November 26, 2008

Revenue (5)

1. **EmR0912** — Rule adopted revising **Chapter Tax 2**, relating to combined reporting for corporation franchise and income tax purposes.

Finding of Emergency

The Department of Revenue finds that an emergency exists and that an emergency rule is necessary for the immediate preservation of the public peace, health, safety or welfare. A statement of the facts constituting the emergency is:

The function of the Wisconsin Department of Revenue is to administer the Wisconsin tax laws. These laws, and tax policy for raising revenue, are determined by the State Legislature. The State Legislature recently enacted numerous items of tax legislation, affecting individuals and businesses alike. Some of these apply retroactively to January 1, 2009. Emergency rules are needed, not only to address the risk of revenue loss, but to add more clarity and certainty about the scope and application of the newly enacted statutes.

Publication Date: August 8, 2009
Effective: August 8, 2009 through January 4, 2010
Hearing Dates: September 25, 2009 and October 16, 2009

2. **EmR0924** — Rule adopted revising **Chapter Tax 11**, relating to sale and use tax.

Finding of Emergency

The Department of Revenue finds that an emergency exists and that an emergency rule is necessary for the immediate preservation of the public peace, health, safety or welfare. A statement of the facts constituting the emergency is:

The changes made by the emergency rule must be effective October 1, 2009, to be in conformity with the Streamlined Sales and Use Tax Agreement. In order to meet this deadline, it is necessary to promulgate this rule as an emergency rule.

Publication Date: September 30, 2009
Effective: October 1, 2009 through February 27, 2010
Hearing Dates: December 1 and 15, 2009

3. **EmR0929** — Rule adopted to create sections **Tax 2.85 and 11.90**, relating to failure to produce records.

Finding of Emergency

The Department of Revenue finds that an emergency exists and that an emergency rule is necessary for the immediate preservation of the public peace, health, safety or welfare. A statement of the facts constituting the emergency is:

The emergency rule is to reflect changes in Wisconsin's tax laws due to the adoption of penalties for failure to produce records.

It is necessary to promulgate this rule order to provide guidance so that the penalties can be administered in a fair and consistent manner.

Publication Date: October 19, 2009
Effective: October 19, 2009 through March 17, 2010
Hearing Dates: December 10 and 21, 2009

4. **EmR0935** — Rule adopted to create **section Tax 1.16**, relating to the financial record matching program.

Finding of Emergency

The Department of Revenue finds that an emergency exists and that an emergency rule is necessary for the immediate preservation of the public peace, health, safety or welfare. A statement of the facts constituting the emergency is:

The emergency rule is to reflect changes in Wisconsin's tax laws due to the creation of the financial record matching program.

It is necessary to promulgate this rule order to provide procedures so that the program can be administered in a fair and consistent manner.

Publication Date: December 22, 2009
Effective: December 22, 2009 through May 20, 2010

5. **EmR0943** — Rule adopted to revise **Chapter Tax 2**, relating to apportionment and nexus.

Finding of Emergency

The Department of Revenue finds that an emergency exists and that an emergency rule is necessary for the immediate preservation of the public peace, health, safety or welfare. A statement of the facts constituting the emergency is:

In 2009, the Wisconsin Legislature enacted Acts 2 and 28, both of which contained substantial changes to Wisconsin's corporation franchise and income tax laws. Most of these changes are effective retroactively to taxable years beginning on or after January 1, 2009. Emergency rules are needed to add certainty about the scope and application of the newly enacted statutes as soon as possible so that taxpayers can file their returns accordingly.

Publication Date: December 31, 2009
Effective: December 31, 2009 through May 29, 2010

Veterans Affairs (2)

1. **EmR0911** — Rule adopted to revise section VA 2.01, relating to the assistance to needy veterans grant program.

Finding of Emergency

The Wisconsin Department of Veterans Affairs finds that an emergency exists and that the rules are necessary for the immediate preservation of the public peace, health, safety, or welfare. A statement of facts constituting the emergency is: The economic recession in effect for the last fiscal year has adversely affected the veteran population. Many veterans have lost their employment or had their scope of employment reduced. In addition to losing employment, many veterans have seen their health care reduced or eliminated. In order to serve the largest population of veterans and ensure minimal health care for that population, the department is requesting emergency rules to define "vision care and to limit the eligibility, by available funding, for "dental care", "hearing care", and "vision care". These eligibility limitations, which address the cost, type and frequency of care available under the program, will allow more veterans in need to access the limited resources of this program.

Publication Date: July 1, 2009
Effective: July 1, 2009 through November 27, 2009
Extension Through: January 26, 2010
Hearing Date: August 14, 2009

2. **EmR0944** — Rule adopted to amend **section VA 2.02 (2)**, relating to the veterans tuition reimbursement program.

Finding of Emergency

The Wisconsin Department of Veterans Affairs finds that an emergency exists and that an emergency rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. A statement of facts constituting the emergency is:

The removal of the existing deadline for completing and receiving an application for the tuition fee reimbursement program has left the department unable to budget the available resources for this program to ensure maximum coverage for eligible veterans throughout the fiscal year. The department is requesting emergency rules to ensure applications can be processed in a responsive manner and to allow the department

to properly manage the program's biennial budget and ensure the welfare of all eligible veterans. The emergency rule will address the need for an application deadline while the department completes the promulgation for a permanent rule for the program.

Publication Date: January 4, 2010
Effective: January 4, 2010 through
 June 2, 2010

Workforce Development (2)

*Public Works Construction Contracts,
 Chs. DWD 290–294*

1. **EmR0941** — Rule adopted to create **section DWD 290.20**, relating to the thresholds for the requirement of prevailing wage rates.

Finding of Emergency

The Department of Workforce Development finds that an emergency exists and that an emergency rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. A statement of facts constituting the emergency is:

The most recent state budget legislation, 2009 Wisconsin Act 28, contained amendments to the state laws which require the payment of prevailing wage rates for work done on projects of public works and, in a new statute, for work done on private projects which receive more than \$1,000,000 of public direct financial assistance. The new provisions become effective on January 1, 2010.

The prevailing wage laws require that when a state agency or local governmental unit contracts for the erection, construction, remodeling, repairing, or demolition of a public works project it must obtain a prevailing wage rate determination from the Department of Workforce Development and require that the contractors and subcontractors on the project pay their employees in accordance with the wage rates established by the determination. Under the law as it existed before the enactment of 2009 Act 28, a prevailing wage rate determination was required for any project with an estimated cost of at least \$48,000 (for a single-trade project) or \$234,000 (for a multi-trade project). Act 28 changes these amounts to an estimated project cost of at least \$25,000. Act 28 has also created a new statute, s. 66.0904, Stats., which

requires that a private developer obtain and comply with a prevailing wage rate determination for a private project that receives at least \$1,000,000 in direct financial assistance from a local governmental unit.

The state and local governmental units and private developers who may be subject to these new requirements of the prevailing wage laws need immediate guidance as to the manner in which the Department will apply the January 1, 2010 effective date to new projects. This rule provides that guidance by establishing that the new threshold requirements will apply to projects for which a request for bids is issued or a contract is negotiated after January 1, 2010.

Publication Date: December 29, 2009
Effective: January 1, 2010 through
 May 30, 2010

2. **EmR0942** — Rule adopted to amend **section DWD 293.02**, relating to the adjustment of thresholds for payment and performance assurance bond requirements and affecting small businesses.

Finding of Emergency

The Department of Workforce Development finds that an emergency exists and that an emergency rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. A statement of facts constituting the emergency is:

The adjustment of the thresholds for the application of the project payment and performance assurance bond requirements ensures that the adjustments are effective on a date certain that is prior to the time of year that project requests are generally submitted to the Department and the need for obtaining bonding is determined. The adjustment avoids imposing an additional administrative burden on local governments and state agencies caused by an effective decrease of the thresholds due solely to inflation in the construction industry. If these new thresholds are not put into effect by emergency rule, the old thresholds will remain effective for approximately six to seven months, until the conclusion of the permanent rule-making process. The thresholds are based on national construction cost statistics and are unlikely to be changed by the rule-making process.

Publication Date: December 29, 2009
Effective: January 1, 2010 through
 May 30, 2010

Scope Statements

Agriculture, Trade and Consumer Protection

Subject

Revises Chapter ATCP 160, relating to county and district fairs.

Objective of the Rule

Update rules for distribution of state aids to county and district fairs. This rule will address recommendations of the Wisconsin Association of Fairs, incorporate current 4-H guidelines, and update exhibit categories. This rule will not change current prize awards (premiums) paid to fair exhibitors.

Policy Analysis

DATCP distributes state aid to county and district fairs under ss. 20.115(4)(b) and 93.23, Stats. DATCP has adopted rules under ch. ATCP 160, Wis. Adm. Code, related to the distribution of state aids. State aids are used to fund prize awards (premiums) to fair exhibitors. Current rules spell out exhibit categories and the amount of state premium aids offered for premiums in each category.

DATCP has traditionally updated its county and district fair rules every 5 years, but has not updated the current rules since 1999. Since 1999, there have been many changes in exhibit categories. This rule will update the current rules to address those changes, and to incorporate current 4-H guidelines.

Policy Alternatives

Do nothing. If DATCP does not update the current rules, those rules will become increasingly out-of-date and inconsistent with current exhibition practices at county and district fairs.

There are no statutory alternatives at this time.

Statutory Authority

Sections 93.07 (1), 92.23 and 20.115 (4) (b), Stats.

Comparison with Federal Regulations

There is no federal law relevant to county and district fairs.

Entities Affected by the Rule

County fairs, county fair boards and county fair exhibitors will be affected by this rule.

Estimate of Time Needed to Develop the Rule

DATCP estimates that it will use the equivalent of 0.4 FTE staff to revise this rule. This anticipates an 8 month period for investigation and analysis, rule drafting, preparing related documents, coordinating advisory committee meetings, holding public hearings and communicating with affected persons and groups. DATCP will use existing staff to develop this rule.

DATCP may not begin drafting this rule until the Board of Agriculture, Trade and Consumer Protection (Board) approves this scope statement. The Board may not approve this scope statement sooner than 10 days after this scope statement is published in the Wisconsin Administrative Register. If the Board takes no action on the scope statement

within 30 days after the scope statement is presented to the Board, the scope statement is considered approved. Before DATCP holds public hearings on this rule, the Board must approve the hearing draft. The Board must also approve the final draft rule before the department adopts the rule.

Controlled Substances Board

Subject

1) Add lisdexamfetamine to Schedule II of the State of Wisconsin Controlled Substances Act.

2) Write into rule application provisions that were created as the application was developed, under authority of ch. 961, Stats.

3) Specify board and department responsibilities and permit holder consequences for failure to reapply for a new permit after the initial permit expires.

Objective of the Rule

The scheduling of lisdexamfetamine recognizes its abuse potential in addition to its medical uses and allows prosecution in state court for illicit production, distribution and possession. Writing application requirements into rule will clarify requirements and expectations for members of the public and applicants. Specifying board and department responsibilities for failure to reapply will prevent the use of controlled substances after the authority to do so has expired.

Policy Analysis

Lisdexamfetamine is not currently a scheduled drug in Wisconsin. The federal Drug Enforcement Administration (DEA) scheduled the drug in 2007, finding that it has a high potential for abuse, has a currently accepted medical use in treatment in the United States, and that abuse of lisdexamfetamine may lead to severe psychological or physical dependence. It is a stimulant approved by the Food and Drug Administration (FDA) for marketing under the trade name Vyvanse TM. It is used to treat Attention Deficit Hyperactivity Disorder (ADHD).

Regarding the application requirements portion of the rule, application for a controlled substances Special Use Authorization (SUA) provides a basis for writing into rule existing and any additional application provisions. See <http://dr1.wi.gov/prof/cont/cred.htm>. By imposing a penalty for failure to reapply for an issued SUA, the board seeks to protect the public by preventing unauthorized possession of controlled substances.

Statutory Authority

Sections 961.11, 961.16 and 961.335 (8), Stats.

Comparison with Federal Regulations

A DEA permit is required for the manufacture, importation, possession, use and distribution of certain substances. Lisdexamfetamine is a Schedule II Controlled Substance under the Federal Controlled Substances Act. Title 21 CFR, Chapter 1300

Entities Affected by the Rule

Police, state courts, pharmacies, the Controlled Substances Board and the Department of Regulation and Licensing.

Estimate of Time Needed to Develop the Rule

200 hours.

Financial Institutions — Credit Unions**Subject**

Creates Chapter DFI-CU 65, relating to credit union service organizations.

Objective of the Rule

The purpose of this rule is to set forth certain procedures and requirements for credit union service organizations.

Statutory Authority

Sections 186.115 (2), 186.235 (8) and 227.11 (2), Stats.

Comparison with Federal Regulations

The federal regulation addressing credit union activities is 12 CFR Part 712.

Entities Affected by the Rule

State-chartered credit unions.

Estimate of Time Needed to Develop the Rule

150 hours.

Contact Information

Mark Schlei, Deputy General Counsel
Dept. of Financial Institutions — Office of the Secretary
P.O. Box 8861
Madison, WI 53708-8861
Phone: (608) 267-1705
Email: mark.schlei@wisconsin.gov.

Health Services**Health, Chs. DHS 110—****Subject**

Revises Chapter DHS 138, relating to health insurance premium subsidies to individuals with human immunodeficiency virus (HIV) infection.

Objective of the Rule

To establish or revise health insurance premium schedules for eligible individuals.

Policy Analysis

The Department amends this statement of scope, to notify the public of its intent to promulgate rules required under 2009 Wisconsin Act 28. The original statement of scope was published in Administrative Register No. 572, effective August 15, 2003.

Sections 252.16 and 252.17, Stats., requires the Department to operate a program that provides subsidies to cover the cost of health insurance premiums for individuals with human immunodeficiency virus (HIV) infection who, because of a medical condition resulting from that infection, must take an unpaid leave from their jobs or are unable to continue working or must reduce their hours of work. The Department has operated this program under ch. DHS 138 since November 1990.

1999 Wisconsin Act 103 modified s. 252.17, Stats., in several respects. First, it increased the family income

eligibility limits under s. 252.17 (3) (b), Stats., from 200% to a maximum of 300% of the federal poverty line. Second, it created a new s. 252.17 (4) (d), Stats., that specifies that the Department will pay a portion of the health insurance premium for individuals whose family income is between 200% and 300% of the federal poverty line. It further specifies that the Department will establish the schedule for payment in administrative rule. Finally, Act 103 created a new s. 252.17 (6) (c), Stats., that requires the Department to establish, in administrative rule, the premium contribution schedule for individuals who have a family income that exceeds 200% but does not exceed 300% of the federal poverty line. Act 103 further directs the Department to take into consideration both income level and family size in establishing the schedule.

2009 Wisconsin Act 28 modifies ss. 252.16 (1) (ar) and 252.17 (3) (d), Stats., to include domestic partner in the definition of “dependent” and to allow an eligible individual’s premium contribution to include the cost of coverage of a domestic partner.

The Department’s modification of ch. DHS 138 will address the changes made to ss. 252.16 and 252.17, Stats., by 1999 Act 103 and 2009 Act 28.

Statutory Authority

Sections 252.16 (6) and 252.17 (6), Stats.

Comparison with Federal Regulations

There are no existing or proposed federal regulations.

Entities Affected by the Rule

Eligible individuals with human immunodeficiency virus (HIV) infection and their spouses and dependents if they are covered under the eligible individual’s health insurance policy.

Estimate of Time Needed to Develop the Rule

The Department estimates that it will take about 10 hours to draft these rules.

Contact Information

Michael McFadden
Division of Public Health
Phone: (608) 266-0682

Workforce Development**Public Works Construction Contracts,
Chs. DWD 290-294****Subject**

Revises section DWD 293.02, relating to adjustment of thresholds for payment and performance bond requirements.

Objective of the Rule

Section 779.14, Stats., sets the cost thresholds for the payment and performance assurance bond requirements that apply to contracts for the performance of labor or furnishing of materials for a public improvement project or public work. Section 779.14 (1s), Stats., requires the Department of Workforce Development to biennially adjust the thresholds requirements in proportion to any change in construction costs since the last adjustment if the adjustment to be made would not be less than 5%. In accordance with the statute, DWD is planning a rule to adjust the thresholds to reflect a 6.82% increase in construction costs from December 2007 to December 2009.

Policy Analysis

This proposed rule is an amendment to existing rules, proposed in accordance with the instructions provided in s. 779.14 (1s), Stats.

Statutory Authority

Sections 227.11 (2) and 779.14 (1s), Wis. Stats.

Comparison with Federal Regulations

The threshold for application of the federal contractor payment and performance bond requirements is a contract greater than \$100,000. This threshold is set by statute and is rarely adjusted.

Entities Affected by the Rule

State agencies, local governmental units, and employers in

the construction industry who contract for public works projects, and employees of these employers.

Estimate of Time Needed to Develop the Rule

20 hours.

Contact Information

Julie Eckenwalder, Section Chief
DWD Construction Wage Standards Section
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Howard Bernstein, DWD Legal Counsel
Dept. of Workforce Development
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Submittal of Rules to Legislative Council Clearinghouse

*Please check the Bulletin of Proceedings – Administrative Rules
for further information on a particular rule.*

Commerce

Financial Resources for Businesses and Communities, Chs. Comm 104—

CR 09–121

On December 23, 2009, the Department of Commerce submitted a proposed rule-making order to the Wisconsin Legislative Council Rules Clearinghouse.

Analysis

The proposed order creates Chapter Comm 136, relating to midwestern disaster area bonds.

Agency Procedure for Promulgation

A public hearing is required and is scheduled for January 25, 2010. The Division of Business Development is primarily responsible for promulgation of the rules.

Contact Information

Sam Rockweiler
Code Development Consultant
Phone: (608) 266–0797
Email: sam.rockweiler@wi.gov

Corrections

CR 09–120

On December 18, 2009, the Department of Corrections submitted a proposed rule-making order to the Wisconsin Legislative Council Rules Clearinghouse.

Analysis

The proposed order revises Chapter DOC 302, relating to sentence calculations and prison release and administrative review of inmate classification decisions.

The rule brings Ch. DOC 302 into compliance with significant changes made in sentence calculations and releases from prison under 2009 Wis. Act 28, including:

1. Creating definitions for the following terms: administrator, agent, assaultive activity, certain early release, detainer, extended supervision, positive adjustment time, projected extended supervision date, risk eligibility date, social worker, and victim.
2. Creating DOC 302.33, DOC 302.34, and DOC 302.35, relating to positive adjustment time under 302.113 (2) (b), 304.06 (1) (bg) 1. and 2., as created by 2009 Wis. Act 28, §§ 2722 and 2751;
3. Creating DOC 302.36 and DOC 302.37, relating to sentence calculations under § 304.06 (1) (bg) 3. and 4., as created by 2009 Wis. Act 28, § 2751, for an inmate who has been convicted under § 973.01, Stats., following the inmate's having served at least 75% or 85% of the confinement time of a bifurcated sentence, depending on the classification of the crime.

4. Creating DOC 302.38 and DOC 302.39, relating to the challenge incarceration program and the earned release program under §§ 302.045 and 302.05, Stats., respectively, as amended by 2009 Wis. Act 28, §§ 2700 – 2712;
5. Creating DOC 302.40, relating to the risk assessment program under § 302.042, as created by 2009 Wis. Act 28, § 2699m;
6. Creating DOC 302.41, relating to the early release of certain inmates within 12 months of their release under § 302.113 (9h), as created by 2009 Wis. Act 28, § 2739; and
7. Repealing and recreating DOC 302.18, relating the inmate requests for review of Department decisions concerning custody, institution placement, program needs, or treatment needs.

Agency Procedure for Promulgation

A public hearing is required and is scheduled for February 25, 2010. The Department of Corrections, Division of Adult Institutions is primarily responsible for promulgation of the rules.

Contact Information

Kathryn R. Anderson, Chief Legal Counsel
Department of Corrections
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Earned Release Review Commission

(Formerly Parole Commission)

CR 09–119

On December 18, 2009, the Wisconsin Earned Release Review Commission submitted a proposed rule-making order to the Wisconsin Legislative Council Rules Clearinghouse.

Analysis

The proposed order repeals and recreates Chapter PAC 1, relating to the release of inmates from state prison through parole or other procedures established through 2009 Wis. Act 28.

The Rule:

1. Revises s. PAC 1.02, Purpose, to more clearly state the purpose of the rule chapter is to set forth the procedures under which the Earned Release Review Commission (formerly Parole Commission) operates.
2. Updated terminology and phrasing throughout the rule to reflect the responsibility of the commission for parole and other release mechanisms under 2009 Act 28.
3. Added definitions for the following terms: denial, extended supervision, extraordinary health condition,

file review, informational deferral, no action, and presumptive mandatory release.

4. Moved the definition of “direct input,” which had previously been in s. PAC 1.06 (9) (c) to the definition section.
5. Modified the term “member of the family” to “family member” and included domestic partners under ch. 770, Stats., in the definition of covered persons.
6. Modified definitions to include reference to 2009 Act 29 release mechanisms. Specifically, “parole grant” became “parole grant or release order,” and “parole eligible” became “parole or release eligible,” and “parole consideration” became “release consideration.”
7. Clarified the purpose of release consideration in s. PAC 1.04.
8. Modified s. PAC 1.05 to address the commission’s authority to consider parole eligibility or release eligibility for inmates depending on the date on which the offense for which they were convicted was committed, including those eligible for early release to extended supervision.
9. Modified s. PAC 1.06 to more clearly state the process by which the commission will consider an inmate for release. Also, included are the additional criteria noted in 2009 Act 28, specifically the inmate has not refused or neglected to perform required or assigned duties. Clarified the criteria used to evaluate participation in required or recommended programming. Finally, deleted the listing of specific offenses which require giving a victim the opportunity for direct input. The commission gives victims who are registered with the Office of Victims Services an opportunity for direct input in all cases.
10. Modified s. PAC 1.07 to include the process for release recommendations for inmates sentenced for offenses committed on or after December 31, 1999. In addition, clarified the authority of a commissioner to amend a deferral or denial.
11. Added to s. PAC 1.07 the authority and the procedures of the commission to modify an inmate’s bifurcated sentence in accordance with s. 304.06 (1) (bk) 1., Stats.
12. Created s. PAC 1.08 to establish procedures for the commission to review inmate petitions for release due to extraordinary health condition or age.
13. Created s. PAC 1.09 to establish procedures for the commission to review inmates who are subject to presumptive mandatory release.

Agency Procedure for Promulgation

A public hearing is required and is scheduled for February 23, 2010. The Wisconsin Earned Release Review Commission is primarily responsible for promulgation of the rules.

Contact Information

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Natural Resources

Environmental Protection — General, Chs. NR 100—, WPDES, Chs. NR 200—, Water Regulation, Chs. NR 300—, Water Supply, Chs. NR 800— **CR 09-123**

On December 22, 2009, the Department of Natural Resources submitted a proposed rule-making order to the Wisconsin Legislative Council Rules Clearinghouse.

Analysis

The proposed order revises Chapters NR 102, 103, 105, 106, 108, 110, 114, 200, 203, 205, 210, 214, 299, 328, 341 and 812 to fix typographical errors, make minor modification or clarification, ensure consistency with federal regulations, code reference update or make technological updates for rules affecting the Bureau of Watershed Management.

Agency Procedure for Promulgation

A public hearing is scheduled for January 28, 2010.

Contact Information

Susan Sylvester, Permits Chief
 Bureau of Watershed Management
 Phone: (608) 266-1099
 Email: Susan.Sylvester@wisconsin.gov

Public Instruction

CR 09-117

On December 17, 2009, the Department of Public Instruction submitted a proposed rule-making order to the Wisconsin Legislative Council Rules Clearinghouse.

Analysis

The proposed order creates section PI 8.01 (4), relating to waivers for school hours.

Agency Procedure for Promulgation

A public hearing is scheduled for February 1, 2010. The Division for Academic Excellence is primarily responsible for promulgation of this rule.

Contact Information

Deborah Mahaffey, Assistant State Superintendent
 Phone: (608) 266-3361
 Email: deborah.mahaffey@dpi.wi.gov

Revenue

CR 09-118

On December 16, 2009, the Department of Revenue submitted a proposed rule-making order to the Wisconsin Legislative Council Rules Clearinghouse.

Analysis

The proposed order creates section Tax 1.16, relating to the financial record matching program.

Agency Procedure for Promulgation

A public hearing is required and will be scheduled at a later date. The Office of the Secretary is primarily responsible for promulgation of the proposed rule.

Contact Information

Dale Kleven
Income, Sales and Excise Tax Division
Phone: (608) 266-8253
Email: dale.kleven@revenue.wi.gov

**Veterans Affairs
CR 09-122**

On December 30, 2009, the Department of Veterans Affairs submitted a proposed rule-making order to the Wisconsin Legislative Council Rules Clearinghouse.

Analysis

The proposed order revises section VA 2.02 (2), relating to the veterans tuition reimbursement grant program.

The amendment of s. VA 2.02 (2) will establish the time period under which an applicant can submit an application to the department. The timely submission of the application is an eligibility requirement for the grant. The proposed amendment would require an applicant to submit an

application to an authorized agent, with all student portions of the application completed, within 60 days following the commencement of a semester, term or course. The application will be considered received if the remainder of the application is completed by an authorized agent and submitted to the department by manual or electronic mail no later than 60 days following the last day of the semester, term or course.

Agency Procedure for Promulgation

A public hearing is required and will be scheduled at a later date. The Office of the Secretary is primarily responsible for preparing the rule, under the direction of the Board of Veterans Affairs.

Contact Information

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Department of Veterans Affairs
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Rule-Making Notices

Notice of Hearing Commerce

*Financial Resources for Businesses and Communities,
Chs. Comm 104—
EmR0931, CR 09–121*

NOTICE IS HEREBY GIVEN that pursuant to section 560.03 of the Statutes, the Department of Commerce will hold a public hearing on emergency rules and proposed permanent rules to create Chapter Comm 136, relating to Midwestern disaster area bonds, and affecting small businesses.

Hearing Information

The public hearing will be held as follows:

<u>Date and Time:</u>	<u>Location:</u>
January 25, 2010 Monday At 10:00 a.m.	Thompson Commerce Center Third Floor, Room 3B 201 West Washington Avenue Madison, Wisconsin

This hearing will be held in an accessible facility. If you have special needs or circumstances that may make communication or accessibility difficult at the hearing, please call Sam Rockweiler at (608) 266-0797 or at Contact Through Relay at least 10 days prior to the hearing date. Accommodations such as interpreters, English translators, or materials in audio tape format will, to the fullest extent possible, be made available upon a request from a person with a disability.

Appearances at the Hearing and Submission of Written Comments

Interested persons are invited to appear at the hearing and present comments on the emergency rules and proposed permanent rules. Persons making oral presentations are requested to submit their comments in writing, via e-mail. Persons submitting comments will not receive individual responses. The hearing record on this rulemaking will remain open until January 29, 2010, to permit submittal of written comments from persons who are unable to attend the hearing or who wish to supplement testimony offered at the hearing. E-mail comments should be sent to sam.rockweiler@wi.gov. If e-mail submittal is not possible, written comments may be submitted to Sam Rockweiler, Department of Commerce, Division of Environmental and Regulatory Services, P.O. Box 14427, Madison, WI 53708-0427.

Copies of Emergency Rules and Proposed Rules

The emergency rules and proposed permanent rules and an analysis of the rules are available on the Internet by entering "Comm 136" in the search engine at the following Web site: <https://health.wisconsin.gov/admrules/public/Home>. Paper copies may be obtained without cost from Sam Rockweiler at the Department of Commerce, Division of Environmental and Regulatory Services, P.O. Box 14427, Madison, WI 53707, or at sam.rockweiler@wi.gov, or at telephone (608) 266-0797, or at Contact Through Relay. Copies will also be available at the public hearing.

Analysis Prepared by Department of Commerce

Statutes interpreted

Section 560.03, Stats.

Statutory authority

Sections 227.11 (2) (a) and 560.03, Stats.

Explanation of agency authority

Section 227.11 (2) (a) of the Statutes authorizes the Department to promulgate rules interpreting the provisions of any Statute administered by the Department. Section 560.03 of the Statutes authorizes and directs the Department to assist in implementing economic and community development programs, and to perform such other functions as the Governor may direct for aiding industrial development.

Related statute or rule

Chapter Comm 113 contains rules relating to allocating a volume cap on tax-exempt private activity bonds for housing, pursuant to 26 USC 146.

Plain language analysis

The rules in this order would establish a procedure by which the Governor can designate tax-exempt Midwestern disaster area bonds that can be issued by, or on behalf of, the State or any political subdivision thereof, under the federal Heartland Disaster Tax Relief Act of 2008. These are private activity bonds that are designed to facilitate the recovery and rebuilding of areas which were declared major disaster areas in 2008.

Comparison with federal regulations

In the Emergency Economic Stabilization Act of 2008 (Public Law 110-343), subtitle A of title VII is the Heartland Disaster Tax Relief Act of 2008 (HDTRA). HDTRA modified section 1400N(a) of the Internal Revenue Code of 1986 to establish tax-exempt Qualified Midwestern Disaster Area (MDA) bonds for areas that in 2008 were declared by the President as being major disaster areas because of severe storms, tornados or flooding. HDTRA limits the aggregate face amount of bonds that may be designated as MDA bonds. HDTRA also delegates to the Governor the power to make certain designations in connection with the issuance of MDA bonds, including designation of the bonds as MDA bonds and designation of a trade or business as replacing another trade or business for these purposes.

Comparison with rules in adjacent states

Although each of the adjacent states are listed in HDTRA as having areas eligible for MDA bonds, an Internet-based search produced corresponding administrative rules only in Iowa. Those rules and related information, by the Iowa Finance Authority, are available at http://www.iowafinanceauthority.gov/en/economic_development/midwestern_disaster_area_bonds/.

Highlights of the Iowa rules include the following:

- Through December 2009, \$2,000,000,000 of Iowa's allocation of MDA bonds will be apportioned based on the amount of damage suffered by each county, and based on FEMA allocations of housing assistance. The remaining \$615,995,000 of Iowa's allocation will be available to all

eligible projects. After December 2009, any remaining MDA bonds will be available to all eligible projects. MDA bonds will be allocated on a first-come, first-served basis. Applications are received on a continuous basis.

- An application must be completed and submitted to the Governor's designee by the borrower, or an agent acting on behalf of the borrower. Applications may be submitted at any time after an inducement resolution for the project has been adopted. A fee of two basis points (.02%) of the amount of MDA bonds for which an application is made must be paid by the applicant upon filing the application.
- A Certification of Allocation is sent to the applicant when an allocation is made. Allocations are valid for 150 days. After the bonds are issued, a representative of the borrower must complete and return a Notice of Issuance and Delivery of Bonds within 10 days of the delivery date for the bonds.

Summary of factual data and analytical methodologies

The data and methodology for developing these rules were derived from and included (1) reviewing the criteria in HDTRA and in Executive Order #288 as issued by Governor Jim Doyle; (2) incorporating applicable best practices the Department has developed in administering similar programs for economic development and business development; and (3) reviewing Internet-based sources of related federal, state, and private-sector information.

Analysis and supporting documents used to determine effect on small business

The primary documents that were used to determine the effect of the rules on small business were HDTRA and Executive Order #288.

No economic impact report was prepared.

Small Business Impact

The rules are expected to result in only beneficial effects on small business because the rules only address tax-exempt private activity bonds that are designed to facilitate the recovery and rebuilding of areas which were declared major disaster areas in 2008.

Initial regulatory flexibility analysis

Types of small businesses that will be affected by the rules.

Any business choosing to pursue tax-exempt private activity bonds that are designed to facilitate the recovery and rebuilding of areas which were declared major disaster areas in 2008.

Reporting, bookkeeping and other procedures required for compliance with the rules.

An application form prescribed by the Department must be completed and submitted to the Department.

Types of professional skills necessary for compliance with the rules.

No new professional skills are necessary for compliance with the rules.

Rules have a significant economic impact on small businesses?

No.

Small business regulatory coordinator

Any inquiries for the small business regulatory coordinator for the Department of Commerce can be directed to Sam Rockweiler, as listed above.

Environmental Analysis

The Department has considered the environmental impact of the proposed rules. In accordance with chapter Comm 1, the proposed rules are a Type III action. A Type III action normally does not have the potential to cause significant environmental effects and normally does not involve unresolved conflicts in the use of available resources. The Department has reviewed these rules and finds no reason to believe that any unusual conditions exist. At this time, the Department has issued this notice to serve as a finding of no significant impact.

Fiscal Estimate

Assumptions used in arriving at fiscal estimate

Although the rules will newly result in review of documentation relating to designating applicants as eligible for Midwestern Disaster Area Bonds, the time needed for these reviews is expected to be spent by current employees. Therefore, the proposed rules are not expected to have any significant fiscal effect on the Department.

The proposed rules are not expected to impose any significant costs on the private sector because the rules address submittal of documentation, and other activities, only by applicants that choose to pursue tax-exempt private activity bonds for the recovery and rebuilding of areas which were declared major disaster areas in 2008.

State fiscal effect

None.

Local government fiscal effect

None.

Long-range fiscal implications

None known.

Agency Contact Person

Steven Sabatke, Wisconsin Department of Commerce, Bureau of Business Finance and Compliance, P.O. Box 7970, Madison, WI, 53707-7970; telephone (608) 267-0762; e-mail Steven.Sabatke@Wisconsin.gov.

Notice of Hearings

Corrections

EmR0939, CR 09-120

NOTICE IS HEREBY GIVEN that pursuant to section 227.11 (2), Stats., the Department of Corrections will hold public hearings to consider an emergency rule and proposed permanent rule revising Chapter DOC 302, relating to changes in various statutory provisions relating to sentence calculations and prison release and to an administrative review of inmate classification decisions.

Hearing information

Date and Time

February 25, 2010
10:00 a.m.

Location

Conference Room 116
State Office Building
819 North 6th Street
Milwaukee, Wisconsin

February 25, 2010 St. Croix Conference Rm., 1st Floor
2:30 p.m. Department of Administration
101 East Wilson Street
Madison, Wisconsin

The public hearing sites are accessible to people with disabilities. If you have special needs or circumstances that may make communication or accessibility difficult at the hearing, please contact Kathryn Anderson, DOC, P.O. Box 7925, Madison, WI 53707-7925, email kathryn.anderson@wisconsin.gov, telephone (608) 240-5049 by February 18, 2010.

Appearances at the Hearing and Submission of Written Comments

Interested persons are invited to appear at the hearing and present comments on the proposed rules. Persons making oral presentations are requested to submit their comments in writing. Written comments on the proposed rule will be accepted into the record and receive the same consideration as testimony presented at the hearing if they are received by Friday, March 5, 2010. Written comments should be addressed to: Kathryn R. Anderson, DOC, P.O. Box 7925, Madison, WI 53707-7925, or by email kathryn.anderson@wisconsin.gov.

Analysis Prepared by Department of Corrections

Statutes interpreted

Sections 302.045 and 302.05, Stats., respectively, as amended by 2009 Wis. Act 28, ss. 2700 – 2712, § 302.113 (9g), as renumbered and amended by 2009 Wis. Act 28, ss. 2729j through 2738, 302.113 (2) (b), 304.06 (1) (bg) 1. and 2., as created by 2009 Wis. Act 28, ss. 2722 and 2751, s. 302.113 (9h), as created by 2009 Wis. Act 28, § 2739, § 973.031, as created by 2009 Wis. Act 28, § 3387t, § 302.042, as created by 2009 Wis. Act 28, s. 2699m, and s. 304.06 (1) (bg) 3. and 4., as created by 2009 Wis. Act 28, § 2751, and s. 301.03 (2), Stats.

Statutory authority

Section 227.11 (2), 301.02, 301.03 (2), and 302.07, Stats.

Explanation of agency authority

The Department of Corrections is responsible for supervision of inmates sentenced to Wisconsin prisons, including sentence calculations. Under 2009 Wisconsin Act 28, the legislature created several statutory provisions which affect the calculation of sentences. The Department is promulgating rules to address these changes. In addition, under s. 301.03, Stats., the Department is responsible for the supervision of inmates. As part of that supervision, the Department reviews inmates for appropriate custody level, facility placement, program needs, and education needs.

Related statute or rule

Sections 302.045 and 302.05, Stats., respectively, as amended by 2009 Wis. Act 28, ss. 2700 – 2712, s. 302.113 (9g), as renumbered and amended by 2009 Wis. Act 28, ss. 2729j through 2738, 302.113 (2) (b), 304.06 (1) (bg) 1. and 2., as created by 2009 Wis. Act 28, ss. 2722 and 2751, s. 302.113 (9h), as created by 2009 Wis. Act 28, § 2739, s. 973.031, as created by 2009 Wis. Act 28, s. 3387t, s. 302.042, as created by 2009 Wis. Act 28, s. 2699m, and s. 304.06 (1) (bg) 3. and 4., as created by 2009 Wis. Act 28, s. 2751

Chapter PAC 1, Wisconsin Administrative Code, which addresses release procedures for inmates, including those under 2009 Wisconsin Act 28.

Plain language analysis

The emergency rule and the proposed permanent rule amend chapter DOC 302 to bring it into compliance with significant changes made in sentence calculations and releases from prison under 2009 Wis. Act 28, including:

1. Creating definitions for the following terms: administrator, agent, assaultive activity, certain early release, detainer, extended supervision, positive adjustment time, projected extended supervision date, risk eligibility date, social worker, and victim.
2. Creating DOC 302.33, DOC 302.34, and DOC 302.35, relating to positive adjustment time under 302.113 (2) (b), 304.06 (1) (bg) 1. and 2., as created by 2009 Wis. Act 28, ss. 2722 and 2751. Under these sections, an inmate may earn positive adjustment time (PAT) at three rates (1 for 2, 1 for 3, or 1 for 5.7) depending on the offense of which the inmate was convicted. The inmate may be eligible for PAT, which may result in modification of the term of confinement of the inmate's bifurcated sentence if the department determines that the inmate is not at a high risk of reoffending, the inmate has not received a major penalty under s. DOC 303.68 (1), and the inmate has not neglected or refused to perform required or assigned duties. The inmate's term of extended supervision is extended by the PAT which results in early release. Thus, the overall length of the inmate's sentence is not changed.
3. Creating DOC 302.36 and DOC 302.37, relating to sentence calculations under s. 304.06 (1) (bg) 3. and 4., as created by 2009 Wis. Act 28, § 2751, for an inmate who has been convicted under s. 973.01, Stats., following the inmate's having served at least 75% or 85% of the confinement time of a bifurcated sentence, depending on the classification of the crime. The inmate may petition the Earned Release Review Commission for release to extended supervision under this provision.
4. Creating DOC 302.38 and DOC 302.39, relating to the challenge incarceration program and the earned release program under ss. 302.045 and 302.05, Stats., respectively, as amended by 2009 Wis. Act 28, ss. 2700 – 2712. The department had not previously had a rule provision addressing either of these two programs. The rule creates provisions which codifies the department's implementation of the programs and also update the provisions to reflect the legislative change which allows inmates who do not have AODA needs to participate.
5. Creating DOC 302.40, relating to the risk assessment program under s. 302.042, as created by 2009 Wis. Act 28, s. 2699m. A Court may impose a risk reduction sentence if the offender agrees to participate in the risk reduction plan established by the department. The department is required to establish the plan, monitor the inmate's progress and participation in the plan, and evaluate the inmate's institutional conduct. If the department determines that the plan has been completed, the department will notify the sentencing court and the office of victim services. The department will release the inmate to extended supervision on or after the inmate's risk eligibility date when the inmate has completed the plan.
6. Creating DOC 302.41, relating to the early release of certain inmates within 12 months of their release under s. 302.113 (9h), as created by 2009 Wis. Act 28, s. 2739.

Eligible inmates may be released to extended supervision not more than 12 months before the extended supervision eligibility date.

7. Repealing and recreating DOC 302.18, relating the inmate requests for review of Department decisions concerning custody, institution placement, program needs, or treatment needs. The revised section clarifies the process for review of the decisions relating to classification.

Comparison with federal regulations

There are no federal regulations that regulate the activities addressed by the proposed rule.

Comparison of similar rules in adjacent states

Illinois:

Under 730 ILCS 5/3–6–3, the state of Illinois has provided for the early release of inmates on account of good conduct. Inmates are able to earn good conduct credit at the rate of 4.5 days of credit or 7.5 days of credit for each month of his sentence of imprisonment for certain very serious crimes. (For example, 1 for 4.5 crimes include: home invasion, armed robbery, and aggravated vehicular hijacking. 1 for 7.5 crimes include: gunrunning, narcotics racketeering, and drug-induced homicide.) For all other offenses, inmates are able to earn one day of good conduct credit for each day of the inmate's sentence of imprisonment. Good conduct credit may be revoked or lost following a due process determination by the Prisoner Review Board which is a citizen member board and which is independent of the IL DOC. Under 730 ILCS 5/5–8–1.1, Illinois has an Impact Incarceration Program which is similar to the Challenge Incarceration Program. It is not limited to individuals who have AODA needs but involves rigorous physical elements.

Iowa:

Under ICA s. 903A.2, each inmate is eligible to earn a reduction of sentence by the accumulation of "earned time." Inmates who receive category A sentences are able to earn credit at the rate of 1.2 days of credit for each day the inmate demonstrates good conduct and satisfactory participation in programs or placement. An inmate may be eligible for an additional reduction of sentence of up to 365 days of the full term of the sentence for exemplary acts. Inmates who receive category B sentences may receive 15/85 of a day for each day of good conduct. Under IA ADC s. 201.–20.18(904), Iowa has established a rigorous program called "violator/shock probation programs" which are aimed at individuals who are on community supervision and who have violated the conditions of supervision. The goal is avoid lengthy periods of incarceration.

Michigan:

Under MCLA 800.33, each inmate shall receive a reduction from his or her sentence. The rate of reduction depends on when the crime was committed (there is a statutory change in the rate for crimes which occurred prior 4/1/87) and what the crime was. An inmate may be eligible for good time credit, disciplinary credit, or special disciplinary credit. Special disciplinary credit is additional credit which an inmate may earn if the inmate has not had a major conduct violation and upon the recommendation of the institution disciplinary credit committee. If the credit is lost, it cannot be restored. An inmate cannot earn any of the three types of credit during a month during which the inmate incurred a major conduct report.

Minnesota:

Under Minnesota law, inmates convicted on or after August 1, 1993 are not eligible to earn good time sentence reduction credit. Under s. 244.171, MN Stats., the commissioner of corrections shall establish a challenge incarceration program.

Summary of the factual data and analytical methodologies

The Department of Corrections has determined that the rule will not have a significant economic impact on a substantial number of small businesses since the rule does not regulate small businesses as that term is defined in s. 227.114, Stats.

Analysis and supporting documents that were used to determine effect on small business

Not applicable.

Small Business Impact

The Department of Corrections has determined that the rule will not have a significant economic impact on a substantial number of small businesses since the rule does not regulate small businesses as that term is defined in s. 227.114, Stats.

Fiscal Estimate

Assumptions used in arriving at fiscal estimate

Positive Adjustment Time (PAT)

This rule implements 2009 Wisconsin ACT 28 language that allows a new mechanism for release of inmates sentenced under bifurcated sentences from confinement to extended supervision (ES). The statutory language created Positive Adjustment Time (PAT) which measures the period of time in days that can be earned to reduce an inmate's period of confinement. PAT has three separate release tracks depending on eligibility as follows:

1. Inmates may be eligible to earn 1 day for every 2 days of confinement towards early release under the following provisions:
 - a. The inmate must have a non-violent misdemeanor conviction or a non-violent Class F–I felony conviction.
 - b. The Department has determined the inmate is "not" high risk for reoffending in the community.
 - c. The inmate must follow established prison rules and not refuse or neglect to perform assigned duties while confined.
 - d. The inmate has not received a major penalty while confined.

When an inmate has earned early release under this new PAT provision, DOC will notify the court within 90 days of release that the inmate qualifies for early release to ES and provide the court with a copy of the objective risk assessment and the inmates conduct report. The court has 30 days to schedule a hearing to determine release, deny release or change the release date to a date not longer than the original confinement portion on the bifurcated sentence. If the 30 days passes without the court scheduling a hearing, the inmate will be released to ES.

If the court decides to review the inmate for early release, a hearing will be scheduled and an order issued within 60 days. At the hearing the court has three options; 1) reject PAT and return the inmate to prison to serve the remaining confinement portion of the sentence before release to ES, 2)

release the inmate to ES, or 3) order the inmate to begin serving the next sentence.

2. Inmates may be eligible to earn 1 day for every 3 days of confinement towards early release under the following provisions:
 - a. Inmates convicted of non-violent misdemeanor's or non-violent Class F-I felonies will not be eligible to earn PAT on the first track (1 day for every 2 days), if the Department has determined these inmates are at high risk of reoffending in the community. Instead these inmates will be eligible to earn PAT on the second track (1 day for every 3 days).
 - b. The inmate has a violent Class F-I felony conviction.
 - c. The inmate must follow established prison rules and not refuse or neglect to perform assigned duties while confined.
 - d. The inmate has not received a major penalty while confined.
3. Inmates may be eligible to earn 1 day for every 5.7 days of confinement towards early release under the following provisions:
 - a. The conviction must be a Class C-E felony.
 - b. The inmate must follow established prison rules and not refuse or neglect to perform assigned duties while confined.
 - c. The inmate has not received a major penalty while confined.

When an inmate has earned early release under the 1 day for every 3 days or the 1 day for every 5.7 days, the inmate has only one opportunity to be seen by the Earned Release Review Commission, (ERRC) formerly the Parole Commission. The inmate must request to be seen by the ERRC and if ERRC recommends release, ERRC must notify the court of the release and the court has the opportunity to schedule a hearing within 30 days. If the court holds a hearing the judge has the option to affirm, deny or change the release date to a date not longer than the original confinement portion. Release is not automatic even if the inmate has achieved his or her goals. The ERRC may or may not recommend early release, and the Court may or may not approve early release.

The Department anticipates that incarcerated inmates will be released early to extended supervision under the new legislation for a PAT. However, the Department is not able to estimate the number of inmates that may be released under PAT and therefore is unable to estimate a state fiscal impact or any savings that may result from early release.

The Department anticipates an increase in workload for Social Workers, Supervising Staff, the Records Office, Bureau of Classification and Movement (BOCM) and probation & parole agents. However, a fiscal impact cannot be estimated for the increased workload.

Bifurcated Sentence Modification for TIS1 & TIS2

Under 2009 Wisconsin ACT 28, two early release options were established for inmates currently serving the confinement portion of a bifurcated sentence under TIS1 or TIS2. Inmates may petition the Earned Release Review Commission (ERRC) under the following two options.

1. The inmate has served 75% of his or her sentence, the crime was a misdemeanor violation or a Class F to I felony, the crime was committed prior to October 1, 2009

and the inmate has not petitioned the sentencing court for early release to ES.

2. The inmate has served 85% of his or her sentence, the crime was a Class C to E felony, the crime was committed prior to October 1, 2009 and the inmate had not petitioned the sentencing court for early release to ES.

The review process begins when the records office creates a list of inmates that have served 75 or 85 percent of his or her bifurcated sentence and are eligible for review by ERRC. The records office forwards the eligibility list to institution social workers, agents and ERRC. The records office also notifies the inmate and the judge and District Attorney from the sentencing court of the upcoming review by ERRC. After ERRC interviews the inmate the results are forwarded to the records office for processing as follows; 1) inmate is denied, 2) the decision is deferred for further review, or 3) the inmate is recommended for release.

If the inmate is recommended for release, ERRC will notify the sentencing court of the inmates release to ES. The court has 30 days to schedule a hearing; if the court does not schedule a hearing within 30 days the inmate will be processed for release to ES.

Either ERRC or the sentencing court can deny release of the inmate or release the inmate to a consecutive sentence. If a consecutive sentence exists, the records office will recalculate the overall ES date. An additional calculation may be required to determine a new Release Eligibility Date (RED) or Projected Extended Supervision Date (PESD).

At this time a fiscal impact cannot be estimated since the Department cannot predict how many inmates will be released from a TIS1 or TIS2 bifurcated sentence.

Earned Release Program (ERP) & Challenge Incarceration Program (CIP)

Under 2009 WI ACT 28, statutory language was enacted that expanded the early release sentencing option for the courts on bifurcated sentences. The language for the Earned Release Program (ERP) and the Challenge Incarceration Program (CIP) now includes offenders that do not have alcohol or drug treatment needs. The prior language required an AODA component to be eligible for either program. The new language refers to an early release rehabilitation program.

The sentencing court would continue to determine statutory eligibility for the offender to participate in ERP or CIP. However, the change in the language allows the Department to determine if an offender has treatment needs not related to AODA that are directly related to his or her criminal behavior and to develop the criterion for entry into non-AODA ERP or CIP.

The Department shall continue to notify the court when the offender has successfully completed ERP or CIP. The court has 30 days to modify the sentence by adding the remaining confinement portion onto the extended supervision (ES) portion. The length of the sentence does not change. The Department has six working days to release the offender after receiving the modified court order.

The Department anticipates incarcerated offenders will be released early to extended supervision under the new non-AODA ERP and CIP programs. However, the Department is not able to estimate the future number of offenders that may be released, but anticipates a reduction in incarceration costs and increased supervision costs since the remainder of the confinement time is added to the extended supervision time.

The Department anticipates increased work duties for Social Workers, the Bureau of Classification & Movement, Probation & Parole Agents and Supervisory Staff. At this time a fiscal impact cannot be estimated for the increased work duties or the number of staff needed to accomplish the additional duties related to the new non-AODA ERP/CIP programs as a result of this legislation.

Risk Reduction Sentence (RRS)

Under 2009 Wisconsin ACT 28, courts may impose another sentencing option called the Risk Reduction Sentence (RRS). The RRS gives the court the ability to sentence a convicted felon to serve 75% of confinement time of a bifurcated sentence if the offender agrees to the RRS rules at sentencing. Under the rules of RRS the inmate must agree to a risk assessment analysis, participate in recommended program/treatment needs and maintain good conduct while confined.

When the Department determines an inmate has maintained good conduct during confinement and has completed the recommended programs/treatment and has served 75% of his or her confinement time on a bifurcated sentence, the Department will send notice to the sentencing court and the Office of Victim Services (OVS) that the inmate is ready to be released to extended supervision (ES). However, if the offender has not satisfied the program plan at the completion of 75% of his or her confinement term, the offender may remain confined for a period of time not to exceed the original confinement term on the bifurcated sentence.

The Department anticipates incarcerated offenders will be released early to extended supervision under the new legislation for a RRS. However, the Department is not able to estimate the number of offenders that may be released under the new RRS rules. We anticipate a reduction in incarceration costs and a reduction in extended supervision costs since the remaining 25% on the confinement portion of the sentence dissolves and is not added to the extended supervision term on the bifurcated sentence.

It's possible the Department may see a reduction in workload for probation & parole agents over time, depending on how many inmates are released under a RRS sentence and an increased workload for prison staff to track incarcerated inmates. At this time a fiscal impact cannot be estimated since the Department cannot predict how many offenders will receive an RRS sentence and the affect on length of confinement.

Certain Early Releases (CER)

This rule implements 2009 WI ACT 28 language that allows the Department of Corrections to release certain offenders serving the confinement portion of a bifurcated sentence to extended supervision (ES), if the offender meets the following criteria:

1. The person is serving the confinement portion of a bifurcated sentence for a misdemeanor or a class F to I felony that is not a violent offense as defined in s. 301.048(2)(bm)1.
2. The prison social worker or ES agent of record has reason to believe that the person will be able to maintain himself/herself while not confined without engaging in assaultive activity.

3. The release to extended supervision date is not more than 12 months before the person's extended supervision eligibility date.

The Department is unable to estimate the number of offenders who may be released early to ES or the fiscal impact resulting from these releases. It is assumed that there will be a reduction in incarceration costs and an increase in extended supervision costs under the new statutory language.

The Department also anticipates an increase in workload to the department for Social Workers, the Records Office, Probation & Parole Agents and Supervisory Staff. At this time a fiscal impact cannot be estimated for the increased workload or the number of staff needed to accomplish the additional duties required for Certain Early Release offenders.

State fiscal effect

Decrease costs.

Text of Emergency Rule and Proposed Permanent Rule

SECTION 1. Section DOC 302.03 (1d), (1h), (1p), (1t), (7m), (9m), (12m), (15g), (15r), (17m), and (18m) is created to read:

(1d) "Administrator" means the administrator of the division of adult institutions.

(1h) "Agent" has the meaning given in s. DOC 328.03 (4).

(1p) "Assaultive activity" means an action that results in or is intended to result in physical harm to another.

(1t) "Certain early release" means the release of an inmate from the institution to extended supervision by decision of the secretary or secretary's designee prior to the completion of the confinement portion of a bifurcated sentence.

(7m) "Detainer" means a writ or other legal instrument issued by a competent officer, directing the warden or superintendent of a correctional facility to notify the issuing authority when the named person is about to be released so that the issuing authority may obtain custody of the named person if appropriate.

(9m) "Extended supervision" means the portion of a bifurcated sentence to be served under the supervision of the department.

(12m) "Positive adjustment time" means a period of time measured in days that can be earned to reduce an inmate's period of confinement.

(15g) "Projected extended supervision date" means the date that an inmate who is serving a bifurcated sentence is eligible for early release under s. 302.113 (2) (b) and 304.06 (1) (bg) 1. and 2., Stats.

(15r) "Risk eligibility date" means the date that an inmate who is serving a risk reduction sentence under s. 973.031, Stats., has served 75% of their confinement time.

(17m) "Social worker" means the institution social worker to whom an inmate is assigned.

(18m) "Victim" has the meaning given in s. 950.02(4), Stats.

SECTION 2. DOC 302.18 is repealed and recreated to read:

DOC 302.18 Administrative Review of a Classification Decision. (1) Within 10 calendar days of an inmate's receipt of a written decision concerning custody, institution placement, program need, or treatment need, the inmate may request a review of the decision under DOC 302.13 (2) or

DOC 302.17 (8) if the inmate believes that the decision was based on erroneous information.

(2) Denial of a request for a classification review under s. DOC 302.17 (11) is not subject to review under this section.

(3) The inmate shall submit a request for review under this section on a form approved by the department.

(4) The review shall be completed by one of the following:

(a) The director if the director is not the decision maker under s. DOC 303.13 (2) or s. DOC 303.17 (8); or

(b) The administrator if the director was the decision maker under s. DOC 303.13 (2) or s. DOC 303.17 (8).

(5) The director or administrator shall respond within a reasonable period of time, following receipt of the administrative review request.

(6) The decision under sub. (5) is final.

SECTION 3. Sections DOC 302.33, DOC 302.34, DOC 302.35, DOC 302.36, DOC 302.37, DOC 302.38, DOC 302.39, DOC 302.40, and DOC 302.41 are created to read:

DOC 302.33 Positive adjustment time—one for two.

(1) **ELIGIBILITY.** Inmates who are sentenced under s. 973.01, Stats., for a misdemeanor or for a Class F to Class I felony that is not a violent offense, as defined in s. 301.048 (2) (bm) 1., Stats., may earn one (1) day of positive adjustment time for every two (2) days served if all of the following apply:

(a) the department has determined the inmate is not at a high risk of reoffending. If an inmate is determined to be at a high risk to reoffend, they may be reviewed for eligibility under 302.34;

(b) the inmate has not received a major penalty under s. DOC 303.68 (1); and

(c) the inmate does not neglect or refuse to perform required or assigned duties.

(2) **EXCLUSIONS.** Notwithstanding sub. (1), this subsection does not apply to any of the following:

(a) An inmate who is the subject of a bulletin issued under s. 301.46 (2m), Stats.

(b) An inmate who has, in his or her lifetime, been convicted of or found not guilty by reason of mental disease or defect of a sex offense, as defined in s. 301.45 (1d) (b), Stats.

(c) An inmate who has, in his or her lifetime, been found to have committed a sex offense in another jurisdiction, as defined in s. 301.45 (1d) (am), Stats.

(d) An inmate who is required to register under s. 301.45, Stats.

(e) An inmate who has, in his or her lifetime, been committed under ch. 975, Stats.

(f) A violent offender, as defined in s. 16.964 (12) (a), Stats.

(g) An inmate who is serving, begins to serve, or who has served during his or her current period of confinement, a sentence for a Class F to Class I felony that is a violent offense, as defined in s. 301.048 (2) (bm) 1., Stats.

(h) An inmate who is serving, begins to serve, or who has served during his or her current period of confinement, a sentence for a Class C to Class E felony.

(i) An inmate who is ineligible for positive adjustment time under this paragraph pursuant to s. 973.01 (3d) (b), Stats.

(j) An inmate who is serving a sentence for an offense against an elderly or vulnerable person, as defined in s. 939.22 (20d), Stats.

(k) An inmate who is serving a sentence for an offense related to ethical government, as defined in s. 939.22 (20m), Stats.

(L) An inmate who is serving a sentence for an offense related to school safety, as defined in s. 939.22 (20s), Stats.

(m) An inmate who is serving a sentence for a felony murder under s. 940.03, Stats.

(n) An inmate who is serving a sentence for a violation of s. 940.11 (1), Stats.

(o) An inmate who is serving a sentence for a violation of s. 940.235, Stats.

(p) An inmate who is serving a sentence for a violation of s. 940.32 (3), Stats.

(q) An inmate who is serving a sentence for a violation of s. 941.21, Stats.

(r) An inmate who is serving a sentence for a violation of s. 946.465, Stats.

(3) **NOTIFICATION TO COURT.** When an inmate is within 90 days of release to extended supervision under sub. (5), the department shall notify the sentencing court that it intends to modify the inmate's sentence and release the inmate to extended supervision. As part of its notification, the department shall provide the court with a copy of the objective risk instrument and conduct record.

(4) **COURT ACTION.** If the court does not schedule a review hearing within 30 days after notification, or the court accepts the department's recommendation following a hearing, the department may proceed under sub. (5). If the court issues an order denying the department's recommendation, the inmate will not be released under this section.

(5) **RELEASE.** An inmate under sub. (1) shall be released to extended supervision when he or she has served the term of confinement in the prison portion of his or her bifurcated sentence, less positive adjustment time earned unless denied by the court.

(6) **MODIFICATION OF EXTENDED SUPERVISION.** When an inmate who has served less than the entire confinement time of the sentence imposed under s. 973.01, Stats., is released to extended supervision under sub. (5), the term of extended supervision is increased so that the total length of the bifurcated sentence does not change.

302.34 Positive adjustment time—one for three. (1) **ELIGIBILITY.** Inmates who are sentenced under s. 973.01, Stats., for a Class F to Class I felony or a misdemeanor that is not a violent offense, as defined in s. 301.048 (2) (bm) 1., Stats., and who is ineligible for positive adjustment time under s. 302.113 (2) (b), Stats., pursuant to s. 973.01(3d) (b), Stats., or for a Class F to Class I felony that is a violent offense, as defined in s. 301.048 (2) (bm) 1., Stats., may earn one (1) day of positive adjustment time for every three (3) days served if all of the following apply:

(a) the department has determined the inmate is not at a high risk of reoffending;

(b) the inmate has not received a major penalty under s. DOC 303.68 (1); and

(c) the inmate does not neglect or refuse to perform required or assigned duties.

(2) **SPECIAL CONSIDERATION.** Inmates ineligible for positive adjustment time under DOC 302.33 (1) (a) may be considered for eligibility under this section.

(3) **EXCLUSIONS.** This section does not apply to any of the following:

(a) An inmate who is the subject of a bulletin issued under s. 301.46 (2m), Stats.

(b) An inmate who has, in his or her lifetime, been convicted of or found not guilty by reason of mental disease or defect of a sex offense, as defined in s. 301.45 (1d) (b), Stats.

(c) An inmate who has, in his or her lifetime, been found to have committed a sex offense in another jurisdiction, as defined in s. 301.45 (1d) (am), Stats.

(d) An inmate who is required to register under s. 301.45, Stats.

(e) An inmate who has, in his or her lifetime, been committed under ch. 975, Stats.

(f) An inmate who is serving, begins to serve, or who has served during his or her current period of confinement, a sentence for a Class C to Class E felony.

(g) An inmate who is serving a sentence for an offense against an elderly or vulnerable person, as defined in s. 939.22(20d), Stats.

(h) An inmate who is serving a sentence for an offense related to ethical government, as defined in s. 939.22 (20m), Stats.

(i) An inmate who is serving a sentence for an offense related to school safety, as defined in s. 939.22 (20s), Stats.

(j) An inmate who is serving a sentence for a felony murder under s. 940.03, Stats.

(k) An inmate who is serving a sentence for a violation of s. 940.11 (1), Stats.

(L) An inmate who is serving a sentence for a violation of s. 940.235, Stats.

(m) An inmate who is serving a sentence for a violation of s. 940.32 (3), Stats.

(n) An inmate who is serving a sentence for a violation of s. 941.21, Stats.

(o) An inmate who is serving a sentence for a violation of s. 946.465, Stats.

(4) PETITION FOR RELEASE. An inmate may petition the earned release review commission for release to extended supervision under PAC 1.

DOC.302.35 Positive adjustment time—one for 5.7. (1) ELIGIBILITY. Inmates who are sentenced under s. 973.01, Stats., for a Class C to Class E felony may earn one (1) day of positive adjustment time for every 5.7 days served if all of the following apply:

(a) the department has determined the inmate is not at a high risk of reoffending;

(b) the inmate has not received a major penalty under s. DOC 303.68 (1); and

(c) the inmate does not neglect or refuse to perform required or assigned duties.

(2) EXCLUSIONS. This section does not apply to any of the following:

(a) An inmate who is the subject of a bulletin issued under s. 301.46 (2m), Stats.

(b) An inmate who has, in his or her lifetime, been convicted of or found not guilty by reason of mental disease or defect of a sex offense, as defined in s. 301.45 (1d) (b), Stats.

(c) An inmate who has, in his or her lifetime, been found to have committed a sex offense in another jurisdiction, as defined in s. 301.45 (1d) (am), Stats.

(d) An inmate who is required to register under s. 301.45, Stats.

(e) An inmate who has, in his or her lifetime, been committed under ch. 975, Stats.

(f) An inmate who is serving a sentence for an offense against an elderly or vulnerable person, as defined in s. 939.22 (20d), Stats.

(g) An inmate who is serving a sentence for an offense related to ethical government, as defined in s. 939.22 (20m), Stats.

(h) An inmate who is serving a sentence for an offense related to school safety, as defined in s. 939.22 (20s), Stats.

(i) An inmate who is serving a sentence for a felony murder under s. 940.03, Stats.

(j) An inmate who is serving a sentence for a violation of s. 940.06, Stats.

(k) An inmate who is serving a sentence for a violation of s. 940.302, Stats.

(L) An inmate who is serving a sentence for a violation of s. 940.31 (1), Stats.

(m) An inmate who is serving a sentence for a violation of s. 948.03 (2) (a), Stats.

(n) An inmate who is serving a sentence for a violation of s. 948.40 (4) (a), Stats.

(3) PETITION FOR RELEASE. An inmate may petition the earned release review commission for release to extended supervision under PAC 1.

DOC 302.36 Modification of bifurcated sentence after serving 75 percent of confinement time. (1) ELIGIBILITY. An inmate sentenced under s. 973.01, Stats., for a misdemeanor or for a Class F to Class I felony committed prior to October 1, 2009, and who has not petitioned a sentencing court for a sentence adjustment under s. 973.195 (1r), Stats., for any offense for which he or she is incarcerated may apply for release to extended supervision when he or she has served at least 75% of the term of confinement portion of his or her bifurcated sentence.

(2) EXCLUSION. This section does not apply to an inmate who is serving, begins to serve, or who has served during his or her current period of confinement, a sentence for a Class C to Class E felony.

(3) PETITION FOR RELEASE. An inmate may petition the earned release review commission for release to extended supervision under PAC 1.

DOC 302.37 Modification of bifurcated sentence after serving 85 percent of confinement time. (1) ELIGIBILITY. An inmate sentenced under s. 973.01, Stats., for a Class C to Class E felony committed prior to October 1, 2009, and who has not petitioned a sentencing court for a sentence adjustment under s. 973.195 (1r), Stats., for any offense for which he or she is incarcerated may apply for release to extended supervision when he or she has served at least 85% of the term of confinement portion of his or her bifurcated sentence.

(2) PETITION FOR RELEASE. An inmate may petition the earned release review commission for release to extended supervision under PAC 1.

DOC 302.38 Challenge Incarceration Program. (1) The department shall provide a challenge incarceration program

which incorporates manual labor, education, military drill and ceremony, age appropriate strenuous physical activity and rehabilitative programming that is directly related to the inmate's criminal behavior in preparation for release on parole or extended supervision.

(2) Inmate's convicted of a crime specified in ch. 940, Stats., or s. 948.02, 948.025, 948.03, 948.05, 948.051, 948.055, 948.06, 948.07, 948.075, 948.08, 948.085, or 948.095, Stats., are excluded from eligibility.

(3) The department or sentencing court shall determine eligibility under one of the following:

(a) For inmates sentenced for crimes committed on or before December 30, 1999 the department determines eligibility.

(b) For inmates sentenced for crimes committed on or after December 31, 1999 the sentencing court determines eligibility.

(4) The department may place an inmate into the challenge incarceration program if the inmate meets all of the following criteria:

(a) The inmate is determined to be eligible for participation under sub. (3);

(b) The inmate volunteers to participate in the program and agrees to the rules and regulations of the program;

(c) The inmate has not attained the age of 40 as of the date the inmate will begin the program;

(d) The inmate meets physical, medical and psychological criteria required for program participation; and

(e) The department determines, using evidence-based assessments that one of the following applies:

1. The inmate has a substance abuse treatment need that requires an intensive level of treatment;

2. The inmate has a substance abuse treatment need that does not require an intensive level of treatment but does require education or outpatient services, and the inmates substance use is not a key factor in his or her criminal behavior; or

3. The inmate has one or more treatment needs not related to substance abuse that is directly related to his or her criminal behavior

(5) The department may restrict participant privileges as necessary to maintain discipline.

(6) The department will determine if placement is appropriate and when placement will occur.

(7) For inmates sentenced for crimes committed on or after December 31, 1999, the department shall determine successful completion of the challenge incarceration program and notify the sentencing court of the successful completion to initiate a modification of the inmate's sentence.

(8) The department shall release the inmate within 6 working days upon receipt of a court order modifying the inmate's bifurcated sentence.

(9) For inmates sentenced for crimes committed before December 31, 1999, the department will determine successful completion of the rehabilitation program and notify the earned release review commission.

DOC 302.39 Wisconsin earned release program. (1) The department shall provide a rehabilitation program for the purposes of release.

(2) Inmate's convicted of a crime specified in ch. 940, Stats., or s. 948.02, 948.025, 948.03, 948.05, 948.051,

948.055, 948.06, 948.07, 948.075, 948.08, 948.085, or 948.095, Stats., are excluded from eligibility.

(3) The department or sentencing court shall determine eligibility under one of the following:

(a) For inmates sentenced for crimes committed on or before December 30, 1999 the department determines eligibility.

(b) For inmates sentenced for crimes committed on or after December 31, 1999 the sentencing court determines eligibility.

(c) For inmates who are serving a bifurcated sentence and whose sentence was imposed on or after December 31, 1999 but before July 26, 2003, the inmate may petition the sentencing court with the department's approval to determine eligibility. The inmate shall serve a copy of the petition on the district attorney who prosecuted him or her.

(4) The department may place an inmate into the Wisconsin earned release program if the inmate meets all the following criteria:

(a) The inmate is determined to be eligible for participation under sub. (3);

(b) The inmate volunteers to participate in the program and agrees to the rules and regulations of the program; and

(c) The department determines, using evidence-based assessments that one of the following applies:

1. The inmate has a substance abuse treatment need that requires an intensive level of treatment.

2. The inmate has a substance abuse treatment need that does not require an intensive level of treatment but does require education or outpatient services, and the inmates substance use is not a key factor in his or her criminal behavior.

3. The inmate has one or more treatment needs not related to substance abuse that is directly related to his or her criminal behavior.

(5) The department may restrict participant privileges as necessary to maintain discipline.

(6) The department will determine if placement is appropriate and when placement will occur

(7) For inmates sentenced for crimes committed after December 31, 1999, the department shall determine successful program completion and notify the sentencing court to initiate a modification of the inmate's sentence.

(8) The department shall release the inmate within 6 working days upon receipt of a court order modifying the inmate's bifurcated sentence.

(9) For inmates sentenced for crimes committed before December 31, 1999, the department will determine successful completion of the rehabilitation program and notify the earned release review commission.

DOC 302.40 Risk Reduction Program. (1) The department shall identify inmates who are sentenced under a risk reduction sentence under s. 973.031, Stats., for a felony under s. 973.01, Stats. For inmates sentenced under a risk reduction sentence the department shall do all of the following:

(a) Complete a validated and objective assessment to identify his or her criminogenic factors and risk to reoffend;

(b) Create a risk reduction plan that is designed to reduce the inmate's risk of reoffending; and

(c) Monitor and review the progress made towards completion of the risk reduction plan. The plan may be

modified if programming is unavailable or a new program need is identified.

(2) The department shall determine if an inmate has completed the risk reduction program by review of the following:

(a) Conduct; and

(b) Participation in the program needs identified in the risk reduction plan

(3) The department may rescind or withhold a determination regarding the completion of the risk reduction plan based misconduct or failure to complete components of the risk reduction plan.

(4) If the department determines that the risk reduction plan has been completed, the department will notify the sentencing court, and the office of victim services.

(5) The department shall release an inmate to extended supervision on or after their risk eligibility date when they have completed the risk reduction program pursuant to sub. (2).

DOC 302.41 Certain early releases under s. 302.113 (9h), Stats. (1) **ELIGIBILITY.** The department may release to extended supervision under s. 302.113 (9h), Stats., certain persons serving the confinement portion of a bifurcated sentence and who meet all of the following conditions:

(a) The inmate is serving a confinement portion of a bifurcated sentence for misdemeanor or a Class F to Class I felony that is not a violent offense, as defined in s. 301.048 (2) (bm) 1., Stats.;

(b) The social worker or agent has reason to believe that the inmate will be able to maintain himself or herself while on extended supervision without engaging in assaultive activity.; and

(c) The release to extended supervision date is not more than 12 months before the inmate's extended supervision eligibility date.

(2) EXCLUSIONS. An inmate is not eligible for certain early release if any of the following apply:

(a) The inmate is the subject of a bulletin issued under s. 301.46 (2m), Stats.

(b) The inmate has, in his or her lifetime, been convicted of or found guilty by reason of mental disease or defect of a sex offense, as defined in s. 301.45 (1d) (b), Stats.

(c) The inmate has, in his or her lifetime, been found to have committed a sex offense in another jurisdiction, as defined in s. 301.45 (1d) (am), Stats.

(d) The inmate is required to register under s. 301.45, Stats.

(e) The inmate has, in his or her lifetime, been committed under ch. 975, Stats.

(3) **RELEASE TO DETAINER.** An inmate who has an active detainer is eligible for certain early release consideration without meeting the criteria under par. (1) (a) if the detainer concerns a sentence imposed in another jurisdiction and the remainder of that sentence is equal to or longer than the remainder of the Wisconsin sentence. In this paragraph, "active" means that the jurisdiction issuing the detainer intends to obtain custody of the inmate immediately upon release.

(4) **NOTIFICATION.** The department shall notify the victim before a release decision. The department shall notify the court and district attorney upon the inmate's release.

(5) **RELEASE AUTHORITY.** The secretary may release eligible inmates under this section consistent with public safety and reentry goals.

Agency Contact Person

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Notice of Hearing

Earned Release Review Commission

(Formerly Parole Commission)

EmR0940, CR 09-119

NOTICE IS HEREBY GIVEN that pursuant to section 227.11 (2), Stats., the Wisconsin Earned Release Review Commission will hold public hearings to consider emergency rules and proposed permanent rules revising Chapter PAC 1, relating to the release of inmates from state prison through parole or other procedures established under 2009 Wis. Act 28.

Hearing information

Date and Time

Location

February 23, 2010
10:00 a.m.

Conference Room 116
State Office Building
819 North 6th Street
Milwaukee, Wisconsin

February 23, 2010
2:30 p.m.

Yahara Conference Rm., 1st Floor
Department of Administration
101 East Wilson Street
Madison, Wisconsin

The public hearing sites are accessible to people with disabilities. If you have special needs or circumstances that may make communication or accessibility difficult at the hearing, please contact Kathryn Anderson, DOC, P.O. Box 7925, Madison, WI 53707-7925, email kathryn.anderson@wisconsin.gov, telephone (608) 240-5049 by February 15, 2010.

Appearances at the Hearing and Submission of Written Comments

Interested persons are invited to appear at the hearing and present comments on the proposed rules. Persons making oral presentations are requested to submit their comments in writing. Written comments on the proposed rule will be accepted into the record and receive the same consideration as testimony presented at the hearing if they are received by Friday, March 5, 2010. Written comments should be addressed to: Kathryn R. Anderson, DOC, P.O. Box 7925, Madison, WI 53707-7925, or by email kathryn.anderson@wisconsin.gov.

Analysis Prepared by Wisconsin Earned Release Review Commission

Statutes interpreted

Section 302.1135, Stats, as created by 2009 WI Act 28, ss. 2729j - 2738 and 2739d - 2739j, and ch. 304, Stats., and s. 304.06 (1) (bg) 1., 2., 3., and 4., as created by 2009 WI Act 28, s. 2751

Statutory authority

Sections 227.11 (2), 304.06 (1) (c), and 304.06 (1) (em), Stats.

Explanation of agency authority

The Earned Release Review Commission (formerly the Parole Commission) has the authority to promulgate rules which govern its procedures for considering inmate petitions for release. This rule updates the current rule (PAC 1) to reflect changes in procedures, practice, and the law.

Under s. 302.1135, Stats, as created by 2009 WI Act 28, ss. 2729j – 2738 and 2739d – 2739j, the Earned Release Review Commission (formerly the Parole Commission) has the authority to consider inmate petitions for release due to age or extraordinary health condition. This rule sets forth the procedure which the ERRC will follow in reviewing these petitions.

Under s. 304.06 (1) (bg) 1. and 2., as created by 2009 WI Act 28, s. 2751, the Earned Release Review Commission has the authority to consider inmate petitions requesting release to extended supervision after having served the term of confinement of his or her bifurcated sentence less positive adjustment time he or she has earned. This rule sets forth the procedure which the ERRC will follow in reviewing these petitions.

Under s. 304.06 (1) (bg) 3. and 4., as created by 2009 WI Act 28, s. 2751, the Earned Release Review Commission has the authority to consider inmate petitions requesting release to extended supervision after having served either 75% or 85% of his or her term of confinement, depending on the offense for which the inmate was sentenced. This rule sets forth the procedure which the ERRC will follow in reviewing these petitions.

Related statute or rule

Section 302.1135, Stats, as created by 2009 WI Act 28, ss. 2729j – 2738 and 2739d – 2739j

Plain language analysis

The emergency rule and the proposed permanent rule:

1. Revises s. PAC 1.02, Purpose, to more clearly state the purpose of the rule chapter is to set forth the procedures under which the Earned Release Review Commission (formerly Parole Commission) operates.
2. Updated terminology and phrasing throughout the rule to reflect the responsibility of the commission for parole and other release mechanisms under 2009 Act 28.
3. Added definitions for the following terms: denial, extended supervision, extraordinary health condition, file review, informational deferral, no action, and presumptive mandatory release.
4. Moved the definition of “direct input,” which had previously been in s. PAC 1.06 (9) (c) to the definition section.
5. Modified the term “member of the family” to “family member” and included domestic partners under ch. 770, Stats., in the definition of covered persons.
6. Modified definitions to include reference to 2009 Act 29 release mechanisms. Specifically, “parole grant” became “parole grant or release order,” and “parole eligible” became “parole or release eligible,” and “parole consideration” became “release consideration.”

7. Clarified the purpose of release consideration in s. PAC 1.04.
8. Modified s. PAC 1.05 to address the commission’s authority to consider parole eligibility or release eligibility for inmates depending on the date on which the offense for which they were convicted was committed, including those eligible for early release to extended supervision.
9. Modified s. PAC 1.06 to more clearly state the process by which the commission will consider an inmate for release. Also, included are the additional criteria noted in 2009 Act 28, specifically the inmate has not refused or neglected to perform required or assigned duties. Clarified the criteria used to evaluate participation in required or recommended programming. Finally, deleted the listing of specific offenses which require giving a victim the opportunity for direct input. The commission gives victims who are registered with the Office of Victims Services an opportunity for direct input in all cases.
10. Modified s. PAC 1.07 to include the process for release recommendations for inmates sentenced for offenses committed on or after December 31, 1999. In addition, clarified the authority of a commissioner to amend a deferral or denial.
11. Added to s. PAC 1.07 the authority and the procedures of the commission to modify an inmate’s bifurcated sentence in accordance with s. 304.06 (1) (bk) 1., Stats.
12. Created s. PAC 1.08 to establish procedures for the commission to review inmate petitions for release due to extraordinary health condition or age.
13. Created s. PAC 1.09 to establish procedures for the commission to review inmates who are subject to presumptive mandatory release.

Comparison with federal regulations

There are no federal regulations which address the procedures for parole or release consideration in Wisconsin.

Comparison of similar rules in adjacent states**Illinois:**

The rules of the Illinois Prisoner Review Board (IPRB) are found in 20 Ill. Adm. Code ss. 1610.10 – 1610.180. Like the ERRC the IPRB notifies the inmate in advance of the parole consideration hearing that the hearing has been scheduled and gives inmates access to the evidence to be considered by the IPRB prior to the hearing. Like the ERRC the purpose of the IPRB hearings is to gather information to determine whether release should occur. The IPRB rules specifically state that the hearings are not adversarial. However, an IL inmate has an attorney present at his or her own expense. The ERRC does not permit an attorney to be present, except for hearings on petitions for release due to extraordinary health condition or age. The IPRB rules set forth a more detailed list of criteria to be considered for release. However, the ERRC listing covers all of the same issues for consideration. The IPRB requires a decision to be made within 7 days of the hearing. There is no comparable timeframe for the ERRC. The IPRB rules provide for a hearing in cases where the IPRB is considering rescinding a grant of parole. The hearing process appears to be comparable to the process used for an initial hearing. In the current rule the hearing on the decision to rescind is a full hearing before an administrative law judge from the Division of Hearings and Appeals, including the opportunity to confront and cross examine witnesses. In the proposed rule the ERRC has removed the opportunity for a

hearing on the issue of rescission. Unlike the ERRC the IPRB provides the opportunity for rehearing.

Iowa:

The rules of the Board of Parole are found in IA 205 chapters 1–8, most specifically IA–ADC 205–8.1, et seq. The agency responsible for making parole and work release determinations is the Iowa Parole Board (Board). The Board is responsible for assessing the risk of each inmate committed to the custody of the IA DOC. Inmates are not eligible for parole if they are serving a mandatory minimum sentence under IC s. 902.11. The Board reviews an inmate annually for parole consideration. If an interview is to be conducted, the Board gives the inmate notice. Factors which are to be considered in parole decisions are: previous criminal record, nature and circumstances of the offense, recidivism record, convictions or behavior indicating a propensity for violence, participation in institutional programs, including academic and vocational training, psychiatric and psychological evaluations, length of time served, evidence of serious or habitual institutional misconduct, success or failure while on probation, prior parole or work release history, prior refusal to accept parole or work release, history of drug or alcohol use, a parole plan formulated by the inmate, general attitude and behavior while incarcerated, and risk assessment. The Board may request that a psychiatric or psychological evaluation be done on an inmate to assist in its determination. Information considered by the Board will normally be made available to the inmate for review. Like the ERRC the Board can conduct an interview and/or a case review when considering release. IA parole proceedings are open to the public, except as “otherwise necessary or proper.” If a person from the public attends, that person may not participate in the proceedings. The number of persons other than the inmate and institution staff who may attend may be limited by the Board. The Board has extensive rules on the conduct of the media during parole proceedings. The Board rules incorporate actual risk assessment scores into its evaluation of whether an inmate is suitable for parole. Depending on the score and an assessment of whether the inmate can be released without detriment to the community or to the inmate, the Board may grant the parole if at least 3 members agree for risk assessment scores of 1 through 6, if at least 4 members agree for scores of 7 or 8, and if the Board is unanimous for a score of 9. The Board may grant an inmate parole at any time following successful completion of work release. Successful completion is a defined concept.

Michigan:

The authority for the Michigan Parole Board (Board) is found in MCLA 791.231a, et seq., and MI ADC R. 791.7715, et seq. Like Wisconsin, the Board may parole an inmate once the inmate has served a minimum term imposed by the sentencing court less allowances for good time. Michigan prohibits release before the inmate has served the minimum term, despite the earning of good time for certain enumerated crimes, including those sentenced to an indeterminate sentence, controlled or counterfeit substance offenses, and habitual offender. Factors to be considered in making a parole decision include: the offense for which the inmate is incarcerated, the inmate’s institutional conduct, program performance, prior criminal record, and other relevant factors; also, the inmate’s statistical risk screening and age. The Board may grant a parole without interviewing the inmate if after evaluating the inmate the Board determines that the

inmate has a high probability of being paroled and the Board intends to parole the inmate. The Board is required to give the inmate 1 month notice of the parole interview, including date and issues and concerns to be discussed during the interview. An inmate may waive the right to an interview before one Board member. The inmate may have a representative of his choice but the representative may not be another inmate or an attorney. There is no right to the appointment of public counsel. Institution staff prepares a parole eligibility report which includes misconduct reports, institution work and education record, health and mental health examination results, and cooperation with the payment of financial obligations. If the Board denies parole, the inmate shall be given a written explanation for the denial and, if appropriate, specific recommendations for corrective action. The Board may amend or rescind a parole decision for cause before the inmate is released on parole. However, at least one member of the Board must conduct an interview with the inmate for the purpose of considering and acting upon information received after the original parole release decision. A parole order may be amended but is not effective until the inmate is given written notice of the amendment. The Board sets the conditions of parole and the amount of the supervision fees to be collected during the period of supervision. In the administrative rules, the Board may consider the inmate’s criminal behavior, institutional adjustment, readiness for release, the inmate’s personal history and growth, the inmate’s physical and mental health. If an inmate is being considered for parole, the inmate shall receive a psychological or psychiatric evaluation before release if the inmate has been hospitalized for mental illness in the last 2 years, has a history of predatory or assaultive sexual offenses, or has serious or persistent history of assaultiveness within the institution. Inmates are evaluated for a parole guideline score which is based on a combination of the length of the time the inmate has been incarcerated for the offense and other listed factors.

Minnesota:

The State of Minnesota does not have a separate Parole Board. The entity which grants paroles and work release is called the executive officer of hearings and release, who has been delegated this authority by the commissioner of corrections. The relevant provisions can be found in MN ADC chapter 2940 [MN ADC 2940.0100, et seq.]. Prior to a reentry review, an inmate is given notice of the date and time of the review. The notice must include the purpose of the review, the material to be covered and the right to review documents which will be considered as part of the review. The inmate may submit written documentation and appear and speak on his or her own behalf during the hearing. Institution discipline may cause an inmate to lose good time or extend a term of incarceration. For inmates with life sentences, there is an advisory panel which is comprised of the deputy commissioner for institutions, the deputy commission for community services, the superintendent or warden of the inmate’s current residence, and the executive officer of the hearings and release unit and whose duties is to review each inmate 3 years before the inmate’s parole or supervised release eligibility date in order to establish a projected release date or future review date. The panel shall assist the commissioner of corrections in considering the inmate’s case history, including the facts and circumstances of the offense for which the life sentence is being served, past criminal history, institutional adjustment, program team reports,

psychological and psychiatric reports where pertinent, and the results of community investigations.

Summary of the factual data and analytical methodologies

The Earned Release Review Commission has determined that the rule will not have a significant economic impact on a substantial number of small businesses since the rule does not regulate small businesses as that term is defined in § 227.114, Stats.

Analysis and supporting documents used to determine effect on small businesses

Not applicable.

Small Business Impact

The Earned Release Review Commission has determined that the rule will not have a significant economic impact on a substantial number of small businesses since the rule does not regulate small businesses as that term is defined in § 227.114, Stats.

Fiscal Estimate

Assumptions used in arriving at fiscal estimate

This rule repeals PAC 1 relating to procedures for the release of inmates from Wisconsin prison and recreates the chapter to incorporate current practice and changes required by 2009 Wisconsin Act 28.

The Earned Release Review Commission [ERRC — formerly the Parole Commission] has authority to promulgate rules governing its procedures for considering inmate petitions for release. This rule incorporates current procedures, changes in practice and law changes [2009 Wisconsin Act 28] including consideration of inmate petitions for release due to age or to extraordinary health considerations, early release of certain truth-in-sentencing offenders [TIS] and inmates who have served 75% or 85% of the term of confinement. This rule sets forth the procedures by which ERRC will operate.

Extraordinary Health or Aged

Prior to the passage of 2009 Act 28, inmates sentenced under truth-in-sentencing [TIS], and who had a Class C through Class I felony, could petition the sentencing court for early release if the inmate had a terminal health condition. Instead of petitioning the sentencing court, inmates will now petition ERRC for early release consideration if the inmate claims to have an extraordinary health condition as certified by two physicians. This procedure also applies to inmates who are 60 years old or older and have served 10 years of the sentence or 65 years old or older and served 5 years of the sentence.

The Department can not estimate the number of inmates who will petition ERRC for early release pertaining to extraordinary health circumstances or age, since many more inmates than those who are eligible may apply.

Positive Adjustment Time

Effective October 1, 2009, ERRC will also review all TIS petitions, rather than the courts, and expand reviews to include Class A and Class B felonies, as well as consideration of positive adjustment time eligibility. The Department can not estimate how many of the eligible inmates will be approved to be released early.

State fiscal effect

Increase costs — may be possible to absorb within agency's budget.

Local government fiscal effect

None.

Fund sources affected

GPR.

Affected Ch. 20 appropriations

Section 20.410 (2), Stats.

Text of Emergency Rule and Proposed Permanent Rule

SECTION 1. Chapter PAC 1 is repealed and recreated to read:

**Chapter PAC 1
GENERAL PROVISIONS**

PAC 1.01 Authority. This chapter is promulgated under ss. 227.11 (2), 304.06 (1) (e), and 304.06 (1) (em), Stats.

PAC 1.02 Purpose. This chapter establishes the process by which the commission reviews requests for parole or release under Ch. 302 and 304, Stats.

PAC 1.03 Definitions. In this chapter:

(1) "Chairperson" means the chairperson of the commission. "Chairperson" includes a commissioner who is designated by the chairperson to perform a specific assignment or duty.

(2) "Commission" means the earned release review commission, including the chairperson and commissioners.

(3) "Commissioner" means a member of the earned release review commission, including the chairperson.

(4) "Deferral" means an action by a commissioner, which follows release consideration and which denies release for a specified period of time.

(5) "Denial" means an action by a commissioner which denies early release to extended supervision or release prior to mandatory release.

(6) "Department" means the department of corrections.

(7) "Direct input" means the opportunity for the victim to communicate with the commission regarding the offender's release.

(8) "Extended supervision" means the portion of a bifurcated sentence imposed under s. 973.01, Stats., wherein the individual is released by the department to supervision in the community.

(9) "Extraordinary health condition" means a condition afflicting a person such as advanced age, infirmity or disability of the person or a need for medical treatment or services not available within a correctional institution.

(10) "Family member" means spouse, domestic partner under ch. 770, Stats., child, sibling, parent or legal guardian.

(11) "File review" means release consideration that takes place outside the presence of the inmate.

(12) "Informational deferral" means an action by a commissioner to hold release consideration in abeyance.

(13) "Mandatory release" or "MR" means the release of an inmate by the department to community supervision as provided under s. 302.11 (1), Stats.

(14) "No action" means release consideration that has been referred to the chairperson or the full commission.

(15) "Parole grant or release order" means the action by the chairperson, ordering the release of an inmate on or after a

specified date to supervision by the department, to begin serving a sentence under 1997 Wis. Act 283, or to another case or sentence or count under s. 973.01, Stats.

(16) “Parole or release eligible” means qualified to be considered for release under ch. 302 or 304, Stats.

(17) “Presumptive mandatory release date” or “PMR” means the date that an eligible inmate may be released on parole unless the commission denies release under s. 302.11 (1g) (b), Stats.

(18) “Release consideration” means the process by which a commissioner reviews relevant information concerning an inmate who is approaching release eligibility, including parole.

(19) “Victim” means a person against whom a crime has been committed or a victim’s family member.

PAC 1.04 Purpose of release consideration. The purpose of release consideration is to evaluate all of the following factors:

- (1) Depreciation of the seriousness of the offense resulting from early release;
- (2) Risk to the community; and
- (3) Reasonable certainty of a crime-free reintegration of the inmate into society.

PAC 1.05 Eligibility for release consideration. (1) **INITIAL ELIGIBILITY.** The commission shall not consider for parole or release to extended supervision any person who is sentenced to the department’s custody until the person has been confined at least 60 days following sentencing.

(2) **PAROLE ELIGIBILITY.** (a) For persons sentenced for offenses committed on or before December 31, 1999, the Chairperson may waive the 25% service of sentence requirement under s. 304.06 (1) (b), Stats., if the chairperson determines that extraordinary circumstances warrant an earlier parole consideration and the sentencing court, district attorney, and the victim, if available, have been notified and permitted to comment upon the proposed recommendation.

(b) **Initial parole eligibility.** For persons sentenced for offenses committed on or before December 31, 1999, the inmate’s eligibility for discretionary parole will be determined under s. 304.06, Stats.

(c) **Subsequent parole eligibility.** 1. When incarceration follows parole revocation without the imposition of a new sentence, parole eligibility shall be established at 6 months from the date of return to the institution, less sentence credit under s. 973.155 (1), Stats.

2. When incarceration follows parole revocation and involves the imposition of a new sentence, parole eligibility shall be established at 6 months, less sentence credit under s. 973.155 (1), Stats., or in accordance with the eligibility date of the new sentence.

3. When incarceration follows parole revocation and initial release consideration occurs, imposition of a new sentence may affect the eligibility date.

(3) **RELEASE ELIGIBILITY.** (a) **Initial release eligibility.** For persons sentenced under s. 973.01, Stats., the inmate’s eligibility for release consideration will be determined under s. 304.06 (1) (bg), Stats.

(b) **Subsequent release eligibility.** When incarceration follows revocation of extended supervision, an eligibility date will be established in accordance with s. 304.06 (1) (bg), Stats.

(4) **WAIVER OF RELEASE CONSIDERATION.** An inmate may waive release consideration at any time by notifying the commission in writing through institution staff. No review or decision will occur. A waiver will not effect future commission decisions

(5) **WITHDRAWAL OF CONSIDERATION.** If an inmate declines to appear before the commission at the time of a scheduled interview or appears but refuses to participate, the failure to appear or participate, unless excused by the commission, shall be construed as a withdrawal of parole consideration. No review or decision will occur. A withdrawal will not effect future parole decisions.

(6) **RE-ESTABLISHMENT OF ELIGIBILITY FOR CONSIDERATION.** To become eligible for release consideration following a waiver or withdrawal, the inmate shall apply in writing to the commission through institution staff. The eligibility date shall be established in accordance with the inmate’s sentence structure. An interview will be scheduled based on the new eligibility date.

PAC 1.06 Release consideration. (1) For persons sentenced for offenses that occurred on or before December 31, 1999, the initial release consideration shall be scheduled during the month prior to the date of first statutory eligibility for parole, unless waived in writing by the inmate, the inmate is not available, in which case the commissioner will set a new interview date, or the inmate has been transferred after which an interview will be scheduled as soon as practicable.

(2) For persons sentenced under s. 973.01, Stats., the inmate will be scheduled for release consideration prior to the earliest eligibility date established under s. 304.06 (1) (bg), Stats.

(3) Release consideration for persons whom the commission has deferred shall be scheduled according to the new eligibility date.

(4) The institution responsible for scheduling release consideration shall give the inmate at least a 15-day written notice of the interview, except following an informational deferral, in which case subsequent notification is not required. When notification is not timely, the inmate may waive the 15-day requirement. If the inmate does not waive, consideration will be postponed until notice can be given. The notice of consideration for release shall address the criteria under sub. (15).

(5) The chairperson may assign one or more commissioners to conduct a release consideration interview.

(6) The inmate shall have access to the documentary information which the commissioner considered, except information determined to be confidential may not be disclosed. An inmate shall have access to records at the correctional institution where the inmate is confined.

(7) During the release consideration interview, the inmate shall be afforded the opportunity to provide information that is relevant, material, and not unduly repetitious, including the opportunity to comment on perceived errors of material fact in the record.

(8) The commissioner’s decision shall be based on information available, including file material, victim’s statements if applicable, and any other relevant information.

(9) A deferral greater than 12 months requires the written approval of the chairperson.

(10) The interview shall be recorded. A transcript shall be prepared only upon an order of the court which has granted a petition for judicial review of the decision.

(11) Release consideration may occur without the inmate present when one of the following circumstances occurs:

(a) The inmate had an interview within the preceding 12 months; or

(b) It is not practicable to arrange for an interview within the timeframe for considering release and the interest of justice as well as that of the inmate would best be served by a file review.

(12) If release consideration occurs under sub. (11) without the inmate being present, the inmate may request an interview in writing through institution staff. The commission may grant the request.

(13) Representation by legal counsel during the interview for release consideration shall not be permitted, except for extraordinary health conditions under s. PAC 1.08.

(14) Interpretive services shall be provided for an inmate in order to facilitate effective communication.

(15) Release consideration is specifically exempt from open meeting legislation under s. 19.85 (1) (d), Stats., and shall be closed to the public. However, upon request, and with the approval of the chairperson, persons with a civic, academic, or professional interest in the release consideration process may be allowed to observe individual proceedings. Observers shall not be allowed if the inmate objects.

(16) A recommendation for release or a grant or order of release may be made after consideration of all the following criteria:

(a) The inmate has become parole eligible under s. 304.06, Stats., and s. PAC 1.05

(b) The inmate has served sufficient time so that release would not depreciate the seriousness of the offense

(c) The inmate has demonstrated satisfactory adjustment to the institution.

(d) The inmate has not refused or neglected to perform required or assigned duties.

(e) The inmate has participated in and has demonstrated sufficient efforts in required or recommended programs which have been made available by demonstrating one of the following:

1. The inmate has gained maximum benefit from programs;

2. The inmate can complete programming in the community without presenting an undue risk; or

3. The inmate has not been able to gain entry into programming.

(f) The inmate has developed an adequate release plan.

(g) The inmate is subject to a sentence of confinement in another state or is in the United States illegally and may be deported.

(h) The inmate has reached a point at which the commission concludes that release would not pose an unreasonable risk to the public and would be in the interest of justice.

(17) The commission shall provide an opportunity for a victim to provide direct input and to attend the interview.

(18) The commission shall permit any office or person to submit a written statement for consideration in its decision-making process.

PAC 1.07 Commission recommendations. (1) After consideration, a commissioner may recommend release with

or without special conditions, or may deny release and defer consideration for a specified period of time. The commissioner shall make the recommendation of release to the chairperson. If release is denied, the commissioner shall establish a date for reconsideration under sub. PAC 1.06 (3), unless the inmate will reach the mandatory release date or the extended supervision date prior to that reconsideration date.

(2) The inmate shall be advised in writing of the decision to defer or to recommend a grant of parole or release, the reasons for the decision and the next opportunity for consideration or the recommended parole or release date.

(3) A commissioner may refer the case to the full commission for a decision. When the chairperson makes a final decision, the inmate shall be notified of the decision in writing and may request an interview with the commissioner through institution staff.

(4) If the chairperson disagrees with a recommendation of the commissioner, the chairperson shall inform the inmate in writing the reason for amending the recommendation.

(5) For persons sentenced under s. 973.01, Stats., if the chairperson approves a recommendation for release, the commission shall notify the sentencing court in accordance with s. 304.06 (1) (bk) 1., Stats., of its intent to modify the inmate's sentence and release the inmate to extended supervision or another case, sentence or count. The commission shall provide the sentencing court with justification for its recommendation. If the court does not schedule a review hearing within 30 days after notification, the commission will proceed with the action recommended. The commission shall issue an order for sentence modification. The term of confinement in the prison portion of the inmate's sentence will be reduced by the period of release and the term of extended supervision of the inmate's sentence will be lengthened by the period of release so that the total length of the sentence as originally imposed by the court will remain unchanged.

(6) A commissioner may withdraw a recommendation for release prior to the issuance of the grant of parole or order for release.

(7) A commissioner may amend a deferral or denial.

(8) If there is a change in circumstances, requiring a denial of the grant or order, subsequent to the issuance of a parole grant or release order but prior to release, the inmate shall be provided written notice of the reasons for rescission and a summary of the evidence supporting the reasons for rescission. The inmate shall be given an opportunity to appear and be heard by an impartial hearing examiner from the division of hearings and appeals in the department of administration. At the hearing the inmate shall be given the right to present witnesses and evidence which are material, relevant, and not unduly repetitious, the right to confront and cross-examine witnesses against the inmate, the right to receive a written statement of the evidence relied upon, and the right to be represented by counsel. After a review of the findings of fact, conclusions of law, and recommendation of the hearing examiner, the chairperson shall make a final decision.

(9) For persons sentenced for offenses committed on or before December 31, 1999, the chairperson may grant or deny parole at any time, if extraordinary circumstances affecting an inmate are documented and verified.

PAC 1.08 Extraordinary health condition release. (1) Eligibility. An inmate serving a bifurcated sentence imposed

under s. 973.01, Stats., or, notwithstanding s. 973.014 (1g) (a) or (2), Stats., serving a life sentence imposed under s. 973.014, Stats., may petition the commission for modification of the inmate's sentence to be released to extended supervision if the inmate meets one of the following eligibility criteria:

(a) The inmate is 65 years of age or older and has served at least 5 years in prison;

(b) The inmate is 60 years of age or older and has served at least 10 years in prison; or

(c) The inmate has an extraordinary health condition.

(2) Right to representation. An inmate who is eligible to petition for modification of the sentence under this section has a right to be represented by counsel in proceedings under this section. An inmate or the department on the inmate's behalf, may apply to the state public defender for determination of indigency and appointment of counsel under s. 977.05 (4) (jm), Stats., before or after the filing of the petition.

(3) Petition. An inmate who files a petition for release under this section shall include the following in support of his or her petition:

(a) Date of birth;

(b) Dates of incarceration for current sentence;

(c) Affidavits of 2 physicians, as defined under s. 448.01 (5), Stats., who practice in this state setting forth the inmate's diagnosis, medical condition, including physical or mental limitations or disabilities, treatment, and prognosis if the inmate is alleging that he or she has an extraordinary health condition. One of the affidavits shall be from the inmate's current attending physician.

(d) Other information as required by the commissioner.

(4) Hearing. (a) Upon receipt of a petition from an inmate, the commission shall review the petition to determine if the inmate is eligible for consideration under sub. (1). If the inmate meets one of the criteria for review, the commission shall schedule the petition for hearing to determine whether the public interest would be served by a modification of the inmate's sentence under s. 302.1135, Stats. The commission may seek additional information regarding the criterion which the inmate asserts as the basis of his or her eligibility for sentence modification under this section, including additional medical information.

(b) The commission shall notify in writing the inmate, the district attorney, any victims of the inmate's crime, the attorney representing the inmate, if applicable, the agent of record, the institution social worker, and the institution record office staff, of the date, time and location of the hearing. The commission will notify victims through the department's office of victim services. The notice of hearing shall be sent to the last-known address of the inmate's victim, postmarked at least 10 days before the date of the hearing.

(c) In advance of the hearing the commission may request from the agent or social worker additional information, including the inmate's release plan. If the inmate meets the criteria for review under ch. 980, Stats., the commission shall request the department to provide information concerning the inmate's status.

(d) The commissioner conducting the hearing shall review the inmate's social service and legal files prior to the hearing.

(e) The commission shall permit the inmate, the attorney representing the inmate, if applicable, the district attorney, and any victims of the inmate's crime to attend the hearing and

give a written or oral statement regarding the inmate's petition for sentence modification, specifically addressing the issue of whether the public interest would be served by the modification. The commission may permit attendance at the hearing in person, by telephone, videoconferencing, or other virtual communication means. During the hearing the commission may request additional information.

(f) Information about the address of a victim will not be released or disclosed.

(g) The inmate has the burden of proving by the greater weight of the credible evidence that a modification of the sentence under this section would serve the public interest.

(h) The hearing shall be recorded.

(5) Decision. (a) Upon conclusion of the hearing, the commissioner conducting shall prepare a report for submission to the chairperson. The report shall contain a summary of the information provided at the hearing, including relevant documents, and a recommendation and the justification for the recommendation to approve or deny the petition.

(b) The commission may defer making a decision or hold a decision in abeyance in order to receive additional relevant information, including medical information. If additional information is received, the commission shall reconvene the hearing. Notice will be given to individuals who were present at the initial hearing. The hearing may be held in person, by telephone, videoconferencing or other virtual communication means at the discretion of the commission.

(c) The chairperson shall issue a decision on the petition based on the report and documents submitted by the commissioner.

1. If the petition is approved, the chairperson shall modify the sentence by establishing a new release date and give notice to the department. The department shall release the inmate to extended supervision within 30 days after the date on which the commission modified the sentence. The modification shall reduce the term of confinement in the prison portion of the inmate's sentence and lengthen the term of extended supervision imposed so that the total length of the sentence originally imposed does not change.

2. If the petition is denied, the inmate may not file another petition within one year of the date of the denial.

3. The commission shall provide notice of its decision in writing to the inmate, the district attorney, any victims of the inmate's crime, the attorney representing the inmate, if applicable, the agent of record, the institution social worker, and the institution record office staff

(6)Appeal. (a) An inmate may seek review of the decision to deny the petition for modification only by common law writ of certiorari.

(b) The state may appeal the decision to grant the petition to circuit court.

PAC 1.09 Presumptive mandatory release review. (1) For an inmate who is subject to PMR and who has been deferred to the mandatory release date of the PMR offense or has waived consideration but is approaching the mandatory release date, a commissioner shall conduct a review two months prior to the mandatory release date.

(2) The institution responsible for scheduling release consideration shall give the inmate at least a 15-day written notice of the interview. When notification is not timely, the 15 day requirement may be waived by the inmate. If the inmate

does not waive, consideration will be postponed until notice can be given.

(a) An inmate may waive appearance at the interview, which will result in the commissioner issuing a decision based on available information.

(b) If an inmate is unavailable for the interview, a commissioner may issue a decision based on available information or may re-schedule an interview if time allows.

(3) The inmate shall have access to the documentary information considered by the commissioner, except information determined to be confidential may not be disclosed. An inmate shall have access to records at the correctional institution where the inmate is confined.

(4) During the PMR interview, the inmate shall be afforded the opportunity to provide relevant information for the commissioner's consideration including the opportunity to comment on perceived errors of material fact in the record.

(5) The commissioner's decision shall be based on information available, including file material and any other relevant information.

(a) Presumptive mandatory release may be denied due to refusal by the inmate to participate in counseling or treatment deemed necessary or for protection of the public.

(b) If a commissioner denies PMR release, the commission shall schedule a subsequent review to consider whether circumstances have changed and the inmate meets the criteria for release.

(c) An inmate may be held until his or her maximum discharge date.

(d) If the commissioner does not deny presumptive mandatory release, the inmate shall be released to parole supervision.

(6) The interview shall be recorded. A transcript shall be prepared only upon an order of the Court which has granted a petition for judicial review of the decision.

Agency Contact Person

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Notice of Hearing Hearings and Appeals CR 09-101

NOTICE IS HEREBY GIVEN that pursuant to s. 301.035 (5), Stats., the Division of Hearings and Appeals will hold a public hearing to consider proposed changes to the Division's rules of practice and procedures in Chapter HA 2, Wis. Adm. Code, relating to hearings before the Division.

Hearing Information

<u>Date and Time</u>	<u>Location</u>
January 26, 2010 at 1:30 p.m.	5005 University Avenue Suite 210 Madison, Wisconsin

The public hearing site is accessible to people with disabilities. If you have special needs or circumstances that may make communication or accessibility difficult at the hearing, please contact the Division of Hearings and Appeals by telephone: 608-266-7668; or by email: DHAmail@wisconsin.gov.

Submission of Written Comments

Written comments in lieu of public hearing testimony may be submitted which must be received no later than the hearing date and should be addressed to Diane Norman, Assistant Administrator for the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705.

Copies of Proposed Rule and Fiscal Estimate

A copy of the full text of the proposed rule revisions and fiscal estimate may be obtained from:

Diane E. Norman, Assistant Administrator, Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705; Phone: 608-266-7667; email: DHAmail@wisconsin.gov.

Analysis Prepared by the Division of Hearings and Appeals

Statutes interpreted

Sections 301.035, 302.11 (7), 302.113 (9), 302.114 (9), 938.357 (5), 973.10, 973.155 (2) and 975.10 (2) and ch. 304 authorize the division to conduct administrative hearings and to enter orders revoking or not revoking various types of community supervision by the Department of Corrections. The proposed rule changes relate to the procedures for such hearings.

Statutory authority

Section 301.035 (5), Stat., gives the division authority to promulgate its rules of procedure. This chapter applies to corrections hearings under ss. 302.11 (7), 973.10, 975.10 (2) and ch. 304, Stats. The procedural rules of general application contained in this chapter also apply to youth aftercare revocation proceedings in any situation not specifically dealt with in ch. DOC 393.

Explanation of agency authority

If a person on probation supervision violates a condition or rule of probation, s. 973.10(2), Stats. allows the Department of Corrections to initiate a proceeding before the division and allows the division to conduct administrative hearings and enter an order either revoking or not revoking probation. If a person on parole or extended supervision violates a condition or rule of parole or extended supervision, ch. 304, Stats., allows the Department of Corrections to initiate a proceeding before the division and allows the division to conduct administrative hearings and enter an order either revoking or not revoking parole or extended supervision. If a juvenile violates a condition or rule of aftercare status, s. 938.357(5), Stat., allows the Department of Corrections to initiate a proceeding before the division and allows the division to conduct administrative hearings and enter an order either revoking or not revoking the aftercare status of a juvenile. The division's rules govern procedures in these hearings.

Related statute or rule

Sections 301.035 (5), 302.11 (7), 302.113 (9) (am), 302.114 (9) (am), 938.357 (5), 973.09, 973.10, 973.155, 975.10 (2), and ch. 304.

Plain language analysis

Section by section details of this rule order are outlined as follows:

Section 1: HA 2.03 is amended to allow documents to be issued or filed by electronic means as well as personally or by United States mail, inter–departmental mail or facsimile transmission. This amendment is to acknowledge the current technology for sending documents and reflects the current procedure of the division.

Section 2: HA 2.04 is amended to allow the secretary of the department of corrections, or any person authorized by the secretary to act in his or her stead, to issue a subpoena to require the attendance of witnesses, on behalf of the department of corrections, in any community supervision revocation proceeding. The secretary is authorized by s. 301.045, Stats. to issue subpoenas in corrections matters. This amendment also allows that a department of corrections agent, who is representing the department of corrections at the revocation hearing, to issue subpoenas as has been the regular practice for revocation hearings. Although the division reserves the right to issue subpoenas directly, the agents are in a better position to issue the necessary subpoenas and the division’s responsibility should be limited to cases where the division is asked to modify or cancel a subpoena.

Section 3: HA 2.05(1) is amended to delete unnecessary statutory references. This section is also amended to require that reference to any witness statements that will be part of the Department of Correction’s evidence shall be included in the notice of the hearing to the offender. This section is also amended to add the word “potential” to the list of evidence and witnesses to reflect that the department may not actually bring this evidence or call these witnesses when the hearing takes place.

Section 4: HA 2.05 (3) is amended to allow the client to attend the hearing by electronic means. The next section explains the authority for this change in more detail. This section is also amended to delete the unnecessary reference to the administrative appeal which is addressed in HA 2.05(8).

Section 5: HA 2.05 (6) is amended to allow a revocation hearing to take place by video conferencing or by telephone. The ability to conduct revocation hearings by videoconference or telephone is the practice of the division at this time. This allows the hearings to be done in a timely manner when the number of hearing requests continue to increase, while the number of administrative law judges does not. Videoconference or telephone hearings satisfy the due process required for revocation hearings. In *Morrissey v. Brewer*, the United States Supreme Court held that the minimum requirements of due process in relation to a community supervision revocation hearing must include the opportunity to be heard in person and the right to confront and cross–examine adverse witnesses. *408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)*. While *Morrissey* specifically provided for the right to “confront and cross–examine adverse witnesses” absent a showing of good cause, *408 U.S. at 489, 92 S.Ct. 2593*, the Supreme Court clarified in *Gagnon* that it “did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence,” *411 U.S. at 782 n. 5, 93 S.Ct. 1756*. Given that the Supreme Court held that these types of statements can substitute for live testimony in some cases, it is not “objectively unreasonable” to conclude that it would have approved of videoconferencing. While

videoconferencing was not available in the early 1970s, and thus was not contemplated by the Supreme Court in *Morrissey*, it provides a person on community supervision with the right to observe and respond to the testimony of his accuser. Videoconferencing also provides the right to cross examine at the hearing. Moreover, if the parties agree or if there are no factual issues regarding the violations alleged by the department, the person on community supervision will be afforded the required due process by appearing by telephone.

Section 6: HA 2.05 (7) is amended to delete unnecessary statutory and administrative rule references. HA 2.05 (7) (f) 3. is amended to replace the term “parole” with the more inclusive term “community supervision.”

Section 7: HA 2.06 (7) (h) is amended to replace the term “hearing” with the term “close of the record” which allows for situations where the record is held open for a specified period of time after the hearing.

Section 8: HA 2.05 (8) (b) is amended to allow for an administrative appeal to be dismissed if the opposing party does not receive a timely copy of the appeal which is necessary to allow both parties to participate in an administrative appeal.

Section 9: The title to HA 2.06 is amended to add the term reconfinement to reflect that the division now has the authority to order reconfinement in extended supervision cases under section 302.113 (9) and 302.114 (9), Stats.

Section 10: HA 2.06 (1) is amended to delete unnecessary statutory references. HA 2.06 (1) is further amended to add the term reconfinement to this section to reflect that the division now has the authority to order reconfinement in extended supervision cases under section 302.113 (9) and 302.114(9), Stats.

Section 11: HA 2.06 (2), (3), (4) and (5) are amended to allow this type of hearing to take place by video conferencing or by telephone. These hearings are normally conducted by telephone. There is no factual dispute in these hearings regarding the alleged violations of community supervision. The only issue in these hearings is the length of incarceration to be determined by the administrative law judge.

Section 12: HA 2.06 (6) (c) is amended to delete unnecessary and outdated statutory references.

Section 13: HA 2.06 (6) (d) is amended to replace the term “hearing” with the term “close of the record” which allows more time for situations where the record is held open for a specific period of time after the hearing.

Section 14: HA 2.06 (7) is amended to delete the requirement for a synopsis which is not required by statute and not the practice of the division. A digital recording of all revocation hearings is available for review when necessary.

Section 15: HA 2.07 is amended to delete the reference to the amount charged per page for transcripts. This amount is outdated and not the correct amount charged by the division. The amount charged is determined by the administrator for the division and can be found in the public notice for access to records and on the internet at <http://dha.state.wi.us/home/RecordsPolicy.htm>.

Comparison with federal regulations

There are no federal regulations governing practice and procedure before the division. While there are procedures for federal parole revocation hearings before the federal parole commission, they are not comparable to the hearings conducted by the division.

Comparison with rules in adjacent states

There are no comparable state regulations governing hearings for revocation of a person's community supervision by the department of corrections.

Summary of factual data and analytical methodologies

The division has not collected any data nor adopted a methodology in connection with its development of these proposed rule changes. The proposed changes generally are intended to clarify the rules, bring the rules into conformity with applicable practice and update the rules to reflect changes in technology.

Analysis and supporting documentation used to determine effect on small business

The division has not collected any data in connection with its determination of the impact of these proposed rule changes on small business or in preparation of an economic impact report.

Small Business Impact

This proposed rule does not have a significant effect on small business.

Fiscal Estimate

The division has already substantially reduced travel expenditures by conducting hearings by videoconference or telephone conference that would have been necessary if an administrative law judge were required to travel in person to each revocation hearing location.

Agency Contact Person

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Notice of Hearings**Natural Resources****Environmental Protection — General, Chs. NR 100—
CR 09-112**

NOTICE IS HEREBY GIVEN THAT pursuant to ss. 227.11 (2) (a), 281.16, 281.19, 281.65 and 281.66, Stats., the Department of Natural Resources will hold public hearings on proposed revisions to Chapters NR 151, 153 and 155, Wis. Adm. Code, relating to the control of polluted runoff and two grant programs that help fund those controls.

Hearing Information

The hearings will be held on:

- January 25, 2010** Outagamie County Highway Dept.
at 1:00 p.m. Highway Shop Conference Room
1313 Holland Road
Appleton
- January 28, 2010** Best Western Trail Lodge
at 1:00 p.m. 3340 Mondovi Road
Room: Chippewa #1
Eau Claire

February 2, 2010 State Office Bldg.
at 1:00 p.m. 141 NW Barstow St., Room 151
Waukesha

February 10, 2010 Lyman F. Anderson Agricultural and
at 1:00 p.m. Conservation Center
1 Fen Oak Court
Classrooms A & B (1st floor)
Madison

February 11, 2010 Rib Mountain Municipal Center
at 1:00 p.m. 3700 N. Mountain Road (HWY NN)
Wausau

Each hearing will begin with a 1 hour informational session followed by formal testimony.

Pursuant to the Americans with Disabilities Act, reasonable accommodations, including the provision of informational material in an alternative format, will be provided to qualified individuals with disabilities upon request. Please call Carol Holden at (608) 266-0140 with specific information on your request at least 10 days before the date of the scheduled hearing.

Copies of Proposed Rule and Fiscal Estimate

The proposed rule revisions and supporting documents, including the fiscal estimate may be viewed and downloaded and comments electronically submitted at the following internet site: <https://health.wisconsin.gov/admrules/public/Home> (Search this website using "NR 151", select "NR 151, 153, 155 Relating to Runoff Management Performance Standards and Grants."). If you do not have internet access, a personal copy of the proposed rules and supporting documents, including the fiscal estimate may be obtained from Carol Holden, DNR – WT/3, P.O. Box 7921, Madison, WI 53707-7921 or by calling (608) 266-0140.

Submission of Written Comments

Written comments on the proposed rules may be submitted via U.S. mail to Carol Holden, DNR – WT/3, P.O. Box 7921, Madison, WI 53707-7921 or by e-mail to carol.holden@wisconsin.gov. Comments may be submitted until Feb. 26, 2010. Written comments whether submitted electronically or by U.S. mail will have the same weight and effect as oral statements presented at the public hearings.

**Analysis Prepared by Department of Natural Resources
Statutes interpreted**

Sections 281.16, 281.65 and 281.66, Stats.

Statutory authority

Sections 227.11 (2) (a), 281.16, 281.19, 281.65 and 281.66, Stats.

Related statute or rule

Chapter 92 and s. 283.33, Stats., and chs. ATCP 50, and NR 120, 152, 154, 216 and 243, Wis. Adm. Code.

Plain language analysis of the rule**Chapter NR 151, Runoff Management**

The rule adds new and modifies existing performance standards that address nonpoint source pollution from both agricultural and non-agricultural sources, including transportation. The new performance standards include:

- a setback from waterbodies in agricultural fields within which no tillage would be allowed;
- a limit on the amount of phosphorus that may run off croplands as measured by a phosphorus index;

- a prohibition against significant discharge of process wastewater from milk houses, feedlots, and other similar sources;
- a standard that requires implementation of best management practices designed to meet a load allocation specified in an approved Total Maximum Daily Load (TMDL).

Modifications are made to the agricultural performance standards addressing cropland soil erosion control, nutrient management and manure storage. The rule also changes the non-agricultural performance standards that address construction site erosion control, post-construction storm water management and developed urban areas. The subchapter addressing transportation performance standards is moved to the non-agricultural performance standards sections. The agricultural implementation and enforcement sections are modified to clarify cost-share eligibility and to better align with the department's stepped enforcement procedures. Some definitions are added and other definitions that are no longer used are deleted.

Chapter NR 153, Targeted Runoff Management And Notice Of Discharge Grant Programs

This existing rule contains policies and procedures for administering targeted runoff management grants to reduce both agricultural and urban nonpoint source pollution. Grants may be used to cost share the installation of best management practices as well as to support a variety of local administrative and planning functions. Projects are selected through a competitive scoring system and generally take two to three years to complete.

The revisions create four project categories for the targeted runoff management grant program instead of one category in the existing rule. The categories include large-scale/TMDL implementation, large-scale/non-TMDL control, small-scale/TMDL implementation and small-scale/non-TMDL control projects. The rule will help the state make progress in meeting its obligation to address impaired waters by focused funding of projects addressing TMDLs.

To implement recent statutory changes to the grant program, the rule creates a mechanism outside the competitive TRM process to fund Notices of Discharge (NODs) issued under ch. NR 243. Other provisions allow the department more flexibility in allocating grant funds and ensure an equitable scoring system. Portions of ch. NR 153 are repealed and recreated to accommodate the newly created categories, to eliminate or add definitions, clarify and expand restrictions on cost sharing, require the establishment of a local ch. NR 151 implementation program as a grant condition and allow for additional safeguards in the application documents.

Chapter NR 155, Urban Nonpoint Source Pollution Abatement And Storm Water Management Grant Program

This existing rule contains policy and procedures for administering the urban nonpoint source and storm water management grant program authorized under s. 281.66, Stats. The department may make grants under this program to governmental units for practices to control both point and nonpoint sources of storm water runoff from existing urban areas, and to fund storm water management plans for developing urban areas and areas of urban redevelopment. The goal of this grant program is to achieve water quality standards, minimize flooding, protect groundwater,

coordinate urban nonpoint source management activities with the municipal storm water discharge permit program and implement the non-agricultural nonpoint source performance standards under ch. NR 151. Grants to a governmental unit may be used to cost share the installation of best management practices as well as to support a variety of local administrative and planning functions. The department may also make grants to the board of regents of the University of Wisconsin System to control urban storm water runoff from campuses in selected locations. Projects are selected through a competitive scoring system and generally take one to two years to complete.

The revisions to ch. NR 155 increase the department's management oversight and accountability of grants while at the same time increase flexibility in how the grants are used. The revisions limit on the amount of money a grantee may receive in a given grant year, increase the department's management oversight of grants by approving all contracts, regardless of cost, provide the department greater flexibility in awarding funds and allow for additional safeguards in the application documents.

The rule also allows the use of local assistance grants to pay for work done by competent in-house staff rather than hiring an outside consultant thus increasing local government's flexibility to control costs. The rule adds requirements that hired consultants be competent in storm water management, all outstanding grants be completed on schedule prior to a new grant award, a final report be submitted and that the department may deny a grant to an otherwise eligible project if there is a potential impact on hazardous sites in addition to historic sites, cultural resources or endangered resources. Other parts of ch. NR 155 are repealed and recreated to define terms, clarify concepts and merge similar sections, giving the department greater flexibility in awarding funds.

Comparison with federal regulations

The rule revisions are consistent with federal regulations that apply to control of nonpoint sources of pollution, animal feeding operations, nutrient management and storm water management. While federal regulations do not apply specifically to cropland practices or livestock operations that have only nonpoint source runoff, there are federal regulations for concentrated animal feeding operations (point sources) that specify control of nutrients entering surface waters. Certain modifications also better align state grant funding priorities with those of the federal government regarding total maximum daily loads.

The rule's phosphorus index performance standard is based on national policy and guidelines on nutrient management issued by the US Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) in April, 1999. The national policy and guidelines suggested the use of one of three phosphorus risk assessment tools, the most comprehensive of which is the phosphorus index. Prior to the adoption of this national policy, states began developing phosphorus-based nutrient management guidelines or regulations. The tillage setback performance standard is based on the phosphorus index calculation that assumes no tillage to the edge of the bank. The performance standard specifying BMPs to meet the load requirements of approved TMDLs will help the state to control nonpoint source pollutants to achieve federally required and approved TMDLs. The control of process wastewater discharge is of sufficient concern that USDA has developed technical standards for management of process wastewater.

Comparison of similar rules in adjacent states

In general, the adjacent states do not use statewide performance standards specifically designed to address polluted runoff from agricultural sources. However, these states have various regulations and procedures in place to address many of the polluted runoff sources that these rule revisions address. All four states use the phosphorus index in some form but none have proposed using it as a statewide performance standard as this rule does. The rule differs from the adjacent states' rules because it has more detail in its phosphorus index, is more quantitative and has more research to validate it. Also, in Wisconsin, pursuant to s. 281.16, Stats., cost sharing must be made available to existing agricultural operations before the state may require compliance with the standards.

Illinois:

Illinois does not have a tillage setback requirement, but it does offer a property tax incentive for the construction of livestock waste management facilities including the development of vegetative filter strips. The filter strips must be in cropland that is surrounding a surface-water or groundwater conduit, must be part of a conservation plan, and must have a uniform ground cover. The minimum and maximum widths that are eligible for the tax reduction is determined by the slope. Illinois does not allow raw materials, by-products and products of livestock management facilities, including milkhouse waste, silage leachate, and other similar products to be discharged to waters of the state. In addition to tax incentives, Illinois relies on federal Clean Water Act section 319 funds from US EPA to fund nonpoint source projects in the state.

Illinois requires that permit applicants follow a series of technical standards that are in the Illinois Urban Manual for both construction and post-construction. If the developer uses the technical standards they are considered in compliance, unless an inspection indicates that the technical standard is not working adequately. The developer will then need to make changes to their construction site or storm water management plan.

Iowa:

Iowa requires that nutrient management plans for livestock operation of 500 or more animal units be based on the phosphorus index. The rule's version of the phosphorus index uses Iowa's "quasi-modeling" approach but the equations are based on Wisconsin research. Iowa does not require a separation distance between tillage activities and waterbodies. Iowa prohibits discharge to waters of the state, polluting waters of the state and discharge to road ditches.

Iowa does not have a performance standard approach to construction projects, but does require BMP implementation. There is no specific goal for post-construction other than to have a storm water management plan similar to the way Wisconsin's program was set up before ch. NR 151 was promulgated in 2002. The requirement on the municipality is to try to control runoff from new development. There are no specific goals.

Iowa is making an effort to coordinate the development of TMDLs with the implementation of water quality improvement plans based on TMDLs. There is not yet a separate funding source specifically for implementing TMDL plans, but there are several different funding sources currently used for watershed project implementation, including section 319 funds and three different sources of state-funded

watershed implementation funds. There is also a state-funded lakes restoration fund which may be partly used for watershed restoration work. Wherever possible, watershed projects try to leverage EQIP and other federal sources of funds.

Iowa does not currently offer a separate source of funds for Animal Feeding Operation BMPs in response to a Notice of Discharge violation. However, Iowa does not preclude a producer from funding because of a Notice of Violation (NOV), except in the case where the NOV results in the requirement for an NPDES permit. Funding from State Revolving Funds and federal section 319 cannot be used for BMPs requiring an NPDES permit, but can be used for non-permitted BMPs. EQIP funds in Iowa are currently allocated such that counties with water quality livestock projects receive 40 percent of the eligible points when scoring for EQIP funding. The Iowa Department of Agriculture and Land Stewardship has a nutrient management program designed to offer financial assistance for livestock producers for manure management, but the program has not been funded in over 10 years.

Michigan:

Michigan does not require a separation distance between tillage activities and waterbodies. The state's rules regarding process wastewater only apply to permitted concentrated animal feeding operations, but discharges from smaller farms are generally prohibited as a violation of water quality standards.

Within permits that apply to municipal separate storm sewer systems (MS4s), Michigan has similar performance standards for post-construction total suspended solids control and peak flow control in new development. It has a minimum treatment volume standard of one inch (or ½ inch if technically supported) where they must achieve an 80 percent total suspended solids reduction. It also has a channel protection criteria where the post-peak flow rate and volume must match the pre-peak flow rate and volume for all storms up to the 2-yr, 24-hr event. The peak flow control standard is more stringent than this rule because it also controls volume. Wisconsin is trying to control streambank erosion by controlling a greater number of smaller storms. Michigan has also identified some water bodies that are not required to meet the channel protection standard, similar to Wisconsin's approach. Michigan has an option to use low impact development to meet these two standards, which is very different from Wisconsin. However, unlike Wisconsin, Michigan is only implementing these performance standards on new development in municipalities that have an MS4 permit. Also, if the municipality had an ordinance in place prior to this rule that addressed water quality for new development even if the performance standard was not included, they are grandfathered in.

Michigan has a pass through grant (section 319 and Clean Michigan Initiative funds) that places a priority on projects that will restore impaired waters or achieve progress toward meeting TMDL load reductions. Michigan does not have a program similar to the rule's mechanism to fund NODs outside of a competitive grant process.

Minnesota:

Minnesota does not have a tillage setback requirement along all waterbodies in agricultural areas, but the state does require a 16.5 foot (one rod) grass strip along certain public drainage ditches as well as vegetated strips, restored wetlands, and other voluntary set-aside lands through federal, state and local programs. For process wastewater, Minnesota rules

place a limit of less than 25 mg/l BOD₅ (biological oxygen demand) that can be released to surface water and, if released to a leach field, the threshold is less than 200 mg/l BOD₅.

For non–agricultural practices, Minnesota recently reissued construction permits that require infiltration and the need for additional BMPs when sites are located near s. 303 (d) or outstanding resource waters. Its permit generally is more prescriptive in terms of how to design a BMP for optimal control, but it is not usually presented as a performance standard which would provide more flexibility. Based on Minnesota’s documentation, it appears to require BMPs that will achieve an 80 percent total suspended solids reduction and ones that will infiltrate the first half inch of runoff from impervious surfaces. Minnesota requires more BMPs, including temperature control, if the receiving water has special needs such as ORW/ERW waters or s. 303 (d) waters.

Minnesota provides funding for TMDLs through its Clean Water Legacy Act and section 319 of the federal Clean Water Act. The state does not have a funding mechanism to fund notices of discharge specifically, but is looking for ways to provide more financial support for runoff from feedlots. There is a state cost–share program which is used alone or in combination with federal cost share.

Summary of factual data and analytical methodologies

The rule’s agricultural performance standards were developed with input from an advisory committee that met four times between December 2007 and February 2008. The following research results and methodologies were analyzed as part of the development of these standards.

Phosphorus Index:

The Wisconsin Buffer Initiative: A Report to the Natural Resources Board of the Wisconsin Department of Natural Resources by the University of Wisconsin–Madison, College of Agricultural and Life Sciences. Dec. 22, 2005.

The following series of articles focused on the watershed targeting approach used in the Wisconsin Buffer Initiative report:

Diebel, M. W., J.T. Maxted, P. J. Nowak, and M. J. Vander Zanden. 2008. Landscape planning for agricultural nonpoint source pollution reduction I: A geographical allocation framework. *Environmental Management* 42 (5): 789–802.

Maxted, J. T., Diebel, M. W., and M. J. Vander Zanden. 2009. Landscape planning for agricultural nonpoint source pollution reduction II: Balancing watershed size, number of watersheds, and implementation effort. *Environmental Management* 43 (1): 60–68.

Diebel, M. W., J.T. Maxted, D. Robertson, S. Han, and M. J. Vander Zanden. 2009. Landscape planning for agricultural nonpoint source pollution reduction III: Assessing phosphorus and sediment reduction potential. *Environmental Management* 43 (1): 69–83.

The following studies of in–field runoff sediment and phosphorus concentrations provided some of the data that was used in building phosphorus index equations:

Panuska, J.C., K.G. Karthikeyan and P.S. Miller. 2008. Impact of surface roughness and crusting on particle size distribution of edge–of–field sediments. *Geoderma* 145: 315 – 324.

Panuska, J.C., K.G. Karthikeyan and J.M. Norman. 2008. Sediment and phosphorus losses in snowmelt and rainfall

runoff from three corn management systems. *Trans. ASABE* 51: 95 – 105.

Panuska, J.C., K.G. Karthikeyan. 2009. Phosphorus and organic matter enrichment in snowmelt and rainfall runoff from agricultural fields. *Geoderma* XX: XX –XX (in review).

The following articles about the in–field runoff monitoring methods to collect the runoff phosphorus data that are used to validate the phosphorus index:

Bonilla, C.A., D.G. Kroll, J. M. Norman, D.C. Yoder, C.C. Molling, P.S. Miller, J.C. Panuska, J. B. Topel, P.L. Wakeman, and K.G. Karthikeyan. 2006. Instrumentation for measuring runoff, sediment, and chemical losses from agricultural fields. *Journal of Environmental Quality* 35:216–223.

Stunetebeck, T.D., M.J. Komiskey, D.W. Owens, and D.W. Hall. 2008. Methods of data collection, sample processing and data analysis for edge–of–field, stream gaging, subsurface tile, and meteorological stations at Discovery Farms and Pioneer Farm in Wisconsin, 2001–7. U.S. Geological Survey Open File report 2008–1015. 51 p.

The following paper showed one year’s worth of research that validated the Wisconsin phosphorus index.

Bundy, L. G., A. P. Mallarino, and L. W. Good. 2008. Field–Scale Tools for Reducing Nutrient Losses to Water Resources. Pp. 159–170 in *Final Report: Gulf Hypoxia and Local Water Quality Concerns Workshop*. September 26–28, 2005, Ames, Iowa. Sponsored by Iowa State University and EPA. Organized by the MRSHNC, Upper Mississippi River Sub–basin Hypoxia Nutrient Committee. St. Joseph, Michigan.

The following paper in press shows that simple runoff phosphorus loss models, like the Wisconsin phosphorus index can work well:

Vadas, P. A., L.W. Good, P.A. Moore Jr., and N. Widman. 2009. Estimating phosphorus loss in runoff from manure and phosphorus for a phosphorus loss quantification tool. *Journal of Environmental Quality* (in press).

The following document shows all the phosphorus index equations on the internet:

Good, L. W. and J. C. Panuska. 2008. Current calculations in the Wisconsin P Index. Available at: <http://wpindex.soils.wisc.edu>.

The following models were used in the development of the Wisconsin phosphorus index:

RUSLE 2 (Revised Universal Soil Loss Equations, version 2), USDA–NRCS official RUSLE2 Program and Database and Training materials and User’s Guides are available from http://fargo.nserl.purdue.edu/rusle2_dataweb/RUSLE2_Ind_ex.htm The draft user’s guide on this site is on the link labeled “RUSLE2 Technology.”

Snap–Plus 1.129.1, 1/20/2009 Copyright 2003–2008 by University of Wisconsin Regents Software developed by P Kaarakka, L.W. Good, and J. Wolter in the Department of Soil Science, UW Madison. This a software program links models for nutrient management (SNAP), conservation assessment (RUSLE2) and the Wisconsin Phosphorus Index (PI) into one software program for multi–year nutrient and conservation planning. The most current version is available at <http://www.snapplus.net/>.

Process wastewater performance standard:

The rule’s performance standard requires that livestock producers have no significant discharge of process

wastewater to waters of the state. Sources of greatest concern include feed storage leachate and milk house waste. Process wastewater discharge is of sufficient concern that USDA has developed technical standards for its management. Environmental aspects of milking center waste water and feed storage leachate, including waste characteristics and water quality impacts, are included in:

Pollution Control Guide for Milking Center Wastewater Management. Springman, R.E., Payer, D.D and B.J. Holmes. 1994. University of Wisconsin–Extension, 44 pages.

“Silage Leachate Control”. Wright, Peter, in *Silage: Field to Feedbunk, Proceedings from the North American Conference, Hershey, Pennsylvania, February 11–13, 1997*. Pages 173 – 186. NRAES, editor.

“Environmental Problems with Silage Effluent”. Graves, R.E., and P.J. Vanderstappen. USDA Natural Resources Conservation Service, National Water Management Center Publication. 6 pages

“Base Flow Leachate Control.” Wright, Peter and P.J. Vanderstappen. Paper No. 94–25 60, ASCE Meeting Presentation at the 1994 International Winter Meeting, Atlanta Ga., December 13 – 16, 1994. 7 pages.

The USDA technical standard for managing milk house waste and feed storage leachate discharges is: *Waste Treatment* (no. 629). USDA, Natural Resources Conservation Service. August, 2008. 22 pages.

Modifications to the non–agricultural performance standards were developed with input from a technical advisory committee that met four times between October 2007 and February 2008. Changes to the protective areas performance standard are based on the department’s Guidance for the Establishment of Protective Areas for Wetlands in Runoff Management Rules, Wisconsin Administrative Code NR 151 in the Waterway and Wetland Handbook, Ch. 10. Department staff gathered information from municipal engineers and conducted analyses under various scenarios using analytical models to provide information to the technical advisory committee including:

- analysis showing the impact of redevelopment on total suspended solids loads, recommendations and estimated costs for control practices,
- analysis of the infiltration performance standards modifications for different land uses.

Analysis and supporting documentation used to determine effect on small business

The department concluded that the revisions to chs. NR 151, 153 and 155 will result in additional compliance requirements for small businesses, but the rules will not result in additional reporting requirements for small businesses. Rather than mandate specific design standards, the rules either establish new performance standards or revise existing performance standards.

Compliance requirements for agricultural producers vary depending on the type of operation and the performance standard, but the revisions to the rules will not change the existing compliance requirements for agricultural operations. Under state law, compliance with the performance standards is not required for existing nonpoint agricultural facilities and practices unless cost sharing is made available for eligible costs. A less stringent compliance schedule is not included for agricultural producers because compliance is contingent on

cost sharing and in many cases, it can take years for a county or the state to provide cost share money to a producer.

Agricultural producers who are in compliance with the existing nutrient management performance standard may already be in compliance with the new phosphorus index and tillage setback performance standards. A phosphorus reduction strategy is included in NRCS nutrient management technical standard 590 (Sept. 5, 2005). A phosphorus index of 6 or less is specified in the PI strategy in Criteria C, 2 of the technical standard. The concept of streambank integrity, as proposed through a tillage setback performance standard, is an assumption of the phosphorus index calculation, which estimates phosphorus delivery to the stream via overland flow, but not from bank erosion or other means that soil, manure or fertilizer might enter the stream from farming operations. In circumstances where the phosphorus index has been determined to be insufficient to achieve water quality standards in areas where an approved total maximum daily load (TMDL) has been approved, a higher level of pollution control may be required. An owner or operator in this situation would be required to implement BMPs designed to meet the load allocation in the TMDL.

The rule revisions will not change the schedules for compliance and reporting requirements for non–agricultural businesses. These requirements are the same as those specified in ch. NR 216. In determining whether non–agricultural small businesses can be exempted from the rules, the department concluded that because the requirements of ch. NR 151, Subchapter III are based on federal requirements the state cannot exempt those businesses. Also, the impacts from certain small business construction activities can have as large a water quality impact as from large businesses.

In determining the compliance and reporting effects, the department considered 1) the existing performance standards and prohibitions in ch. NR 151, 2) the requirements of NRCS technical standard 590 needed to meet the nutrient management performance standard, 3) assumptions contained in the Wisconsin Phosphorus Index, 4) compliance and reporting requirements under ch. NR 216, Subchapter II, 5) agreement with the department of commerce to regulate storm water discharges from commercial building sites under one permit, and 6) feedback from members of advisory committees that included small business owners and organizations.

Small Business Impact (including how this rule will be enforced)

The overall effect on small businesses may be increased time, labor and money spent on BMPs or planning tools, but there will not be a significant economic impact on small business. However, for agricultural producers the proposed new agricultural performance standards and the revised existing agricultural performance standards are not enforceable unless 70 percent cost sharing is provided, or up to 90 percent for economic hardship cases. The rules will be enforced either through county ordinances, DNR stepped enforcement procedures or a combination of the two.

Small businesses in the construction industry will not see an effect from the changes to the construction performance standard, but may experience increased costs from the changes to some of the post–construction performance standards. Most of the businesses affected by the changes to the total suspended solids standard will be commercial and it is difficult to estimate how many of those would be classified

as small businesses. The modifications to the infiltration and the protective area performance standards may add additional costs, but they are expected to be small. Businesses affected will be both large and small. The rule will be enforced through permits required under ch. NR 216, or through local ordinances. For the non-agricultural performance standards, cost sharing is not required for compliance. However, the department may award grants for certain BMPs and planning activities.

Initial regulatory flexibility analysis

Pursuant to s. 227.114, Stats., the proposed rule may have an impact on small businesses. The initial regulatory flexibility analysis is as follows:

Describe the type of small business that will be affected by the rule.

Agricultural producers (crops and livestock), business and associated professionals involved with construction (developers, engineers, contractors, others in the building profession, and small commercial establishments that meet the definition of small business).

Briefly explain the reporting, bookkeeping and other procedures required for compliance with the rule.

None.

Describe the type of professional skills necessary for compliance with the rule.

Familiarity with software such as SNAP Plus and RUSLE2 will be needed for the phosphorus index agricultural performance standard.

Small business regulatory coordinator

The Department's Small Business Regulatory Coordinator for this rule may be contacted at Julia.Riley@wisconsin.gov or by calling (608) 264-9244.

Environmental Analysis

The Department has made a preliminary determination that this action does not involve significant adverse environmental effects and does not need an environmental analysis under ch. NR 150, Wis. Adm. Code. However, based on the comments received, the Department may prepare an environmental analysis before proceeding with the proposal. This environmental review document would summarize the Department's consideration of the impacts of the proposal and reasonable alternatives.

Fiscal Estimate

Summary

Proposed rule revision will result in an increased demand on agency staff devoting more time to training, education, grant oversight, enforcement and development of guidance and procedures. The department estimates that a total of 10.5 FTEs will be needed to implement all three rules.

State fiscal effect

Increase costs. Costs will not be absorbed within the agency's budget.

Local government fiscal effect

Increase costs.

Types of local governmental units affected

Towns, Villages, Cities, Counties.

Fund sources affected

GPR, SEG.

Long-range fiscal implications

State cost-share grants to fully implement the process wastewater performance standard would be \$9.3 million or \$930,000 annually if awarded over a 10-year period. However, this estimate is dependent upon the availability of cost-share funds to implement the standard.

Agency Contact Person

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Notice of Hearing

Natural Resources

Environmental Protection — General, Chs. NR 100—, WPDES, Chs. NR 200—, Water Regulation, Chs. NR 300—, Water Supply, Chs. NR 800—

CR 09-123

NOTICE IS HEREBY GIVEN THAT pursuant to Wisconsin Stats. ss. 30.12, 30.19, 227.11, 281.15, 281.41, 283.11, 283.31, 283.37, 283.39, and 283.49, the Department of Natural Resources will hold a public hearing on revisions to Chapters NR 102, 103, 105, 106, 108, 110, 114, 200, 203, 205, 210, 214, 299, 328, 341, and 812, Wis. Adm. Code, relating to updating rules to accommodate new technologies and construction methods, require electronic submittals of wastewater permit documents, ensure consistency with federal water program regulations, fix typographical errors, and make minor modifications or clarifications to a variety of rules affecting the Bureau of Watershed Management.

Hearing Information

Date and Time

January 28, 2010
Thursday
at 11:00 AM

Location

Conference Room G09
DNR Office Building GEF II
101 S. Webster Street
Madison

Pursuant to the Americans with Disabilities Act, reasonable accommodations, including the provision of informational material in an alternative format, will be provided for qualified individuals with disabilities upon request. Please contact Susan Sylvester at 608-266-1099 with specific information on your request at least 10 days before the date of the scheduled hearing.

Copies of Proposed Rules and Fiscal Estimate

The proposed rules and supporting documents, including the fiscal estimate may be viewed and downloaded and comments electronically submitted at the following Internet site: <http://adminrules.wisconsin.gov> (Search this Web site using the Natural Resources Board Order No. WT-15-09). If you do not have Internet access, a personal copy of the proposed rules and supporting documents, including fiscal estimate may be obtained from Susan Sylvester, Bureau of Watershed Management, P.O. Box 7921, Madison, WI 53707-7921 or by calling 608-266-1099.

Submission of Written Comments

Written comments may also be submitted via U.S. mail to Ms. Susan Sylvester, Bureau of Watershed Management, P.O. Box 7921; Madison, WI 53707-7921 or by email to Susan.Sylvester@wisconsin.gov. Comments may be submitted until February 5, 2010. Written comments whether submitted electronically or by U.S. mail will have the same weight and effect as oral statements presented at the public hearing.

Analysis Prepared by the Department of Natural Resources

Statutes interpreted

Sections 30.12, 30.19, 281.15, 281.17, 281.41, 283.13, 283.31, 283.37, 283.39, 281.49 and 282.55, Stats.

Statutory authority

Sections 30.12, 30.19, 227.11, 281.11, 281.12, 281.15, 281.17, 281.41, 283.11, 282.13, 283.31, 283.37, 283.39, 283.49, and 283.55, Stats.

Explanation of agency authority

The Department has authority under ss 30.12, 30.19, 227.11, 281.11, 281.12, 281.15, 281.17, 281.41, 283.11, 283.13, 283.31, 283.37, 283.39, 283.49, and 283.55, Stats., to promulgate rules and clarify process.

Related statute or rule

These rules relate directly to regulation of activities in wastewater discharge permits or in navigable waters under ch. 30, Stats., waters designations in ch. NR 1, and the NR 100, 200, and 300 series rules.

Plain language analysis

The purpose of this rule update is to modify the existing rules to clarify, make consistent with federal regulations, clean up typographical errors, incorporate technology advances, or make minor modifications. The Bureau of Watershed Management has not undertaken the effort to clean up our rules and therefore this rule package is fairly large since several rules affect the Bureau and need to be updated and corrected.

NR 102 is the chapter that contains the listing waterbodies for outstanding or exceptional resource waters. There are several recommended pages of changes (13 pages in the ORDER). This code has primarily been changed to reflect typographical errors in the original listing of these waters, or if the water exists in more than one county, we have added the other county. To be consistent with the addition of two Wild Rivers to State Statute s. 30.26 in early 2009, language was refined and portions of these two existing ORW waters were moved to the Wild Rivers section of NR 102; however, this does not affect their status as ORW. With the exception of the 2009 statutory additions, there are no additions of new waterbodies, only corrections to the ones currently on the list.

NR 103 is the chapter that contains Water Quality Standards for Wetlands and the changes proposed are technical changes to reflect s. 281.36, Wis. Stat., a statute that was adopted after the rule went into effect.

NR 105 is the chapter that contains surface water quality criteria and secondary values for toxic substances. The changes requested for this chapter are typographical errors or values that have been updated because of new analytical methods. The changes to Table 9 in ch. NR 105 are done to reflect changes to Federal drinking water standards and are

consistent with changes that were made in ch. NR 809. All other numerical changes are typographical errors.

NR 106 is the chapter which contains procedures for Calculating Water Quality Effluent Limits for substances discharged to surface waters. Changes to this chapter are primarily for clarification or typographical errors.

NR 108 is the chapter which outlines the Requirements for Plans and Specifications submittals for reviewable projects and operations of community water systems, sewerage systems and industrial wastewater facilities. The changes include technology updates requesting electronic submittals in addition to paper copies of final plans and specifications. To be consistent with federal regulations, the department proposes modification to s. NR 108.04 (5).

NR 110 is the chapter containing requirements for Sewerage Systems. Most of this rule package contains changes to this chapter, which needs to be updated primarily because of confusion on how to implement this rule (22 pages in the ORDER). Many changes are recommended to clarify the rule; other changes are because of technological updates. Revisions to this chapter are proposed to revise and clarify requirements for lift station design, influent and effluent flow monitoring, and to clarify language which has been commonly misunderstood. While these changes are voluminous, they reflect current practice and are not substantial, they are minor changes that make this rule more understandable and easier to implement. In 1997, the Department prepared draft code revisions for lift station requirements in ch. NR 110, and conducted a public hearing and obtained public comments. But the rule making effort was then placed on hold due to workload issues, and the code revision process was effectively terminated prior to promulgation. Many of the NR 110 code changes now being proposed were obtained from this 1997 work effort.

NR 114 is the chapter for Certification Requirements for Waterworks, Wastewater Treatment Plant, Septage Servicing and Water System Operations. Proposed changes to this chapter include adding a "Master Operator" category to the Septage Servicing subchapter II. This is a category that the stakeholders have asked for to develop a succession of responsibilities. This has been an issue for several years and this code change will help satisfy the needs of the stakeholders.

NR 200 is the chapter for Application for Discharge Permits and Water Quality Standards Variances. The proposed change to this rule is a technological update for the submission of permit applications on the web-based application system. The other changes are typographical or to be consistent with federal regulations.

NR 203 is the chapter for WPDES Public Participation Procedures. The proposed change to this code is to make it consistent with federal regulations.

NR 205 is the chapter for General Provisions in WPDES permits. The proposed technology update is to require electronic submission of discharge monitoring reports. Other changes are clarification of unscheduled bypassing of wastewater or to be consistent with federal regulations.

NR 210 is the chapter for Sewage Treatment Works. The minor clarification changes are to reflect date changes or clarification of terms. A modification is proposed to require that emergency operating provisions (such as stand-by generator or pump) be provided for all wastewater pumping stations.

NR 214 is the chapter for Land Treatment of Industrial Liquid Waste By-Product Solids and Sludges. One proposed change is to clarify subsurface systems to be consistent with ch. COMM 83.

NR 299 is the chapter containing the Water Quality Certification requirements. The proposed changes to this chapter are technical changes to reflect s. 281.36, a statute that was adopted after the rule went into effect and to provide clarity with respect to the original intent of the rule.

NR 328 is the chapter for Shore Erosion Control Structures in Navigable Waterways. The recommended changes are to provide clarification or typographical changes.

NR 341 is the chapter for Grading on the Bank of Navigable Waterways. The proposed changes to this rule are to provide typographical changes.

NR 812 is the chapter for Well Construction and Pump Installation. The proposed change to this rule is to correct the code reference to NR 110 made in this proposed rule package.

Comparison with federal regulations

The proposed rule contains minor modification, fixes typographical errors and updates the current rules to be consistent with federal regulations. Some of the revisions are to make our current regulations more consistent with federal regulations under the federal Clean Water Act.

Comparison with rules in adjacent states

These rules are being updated to be consistent with federal regulations so they should be consistent with adjacent states.

Summary of factual data and analytical methodologies

The proposed code revisions are minor in nature, so there are no data collections or extensive research to substantiate the revisions. Some of the minor modifications are to clarify but not substantially revise, technical requirements that are based on standard engineering design methodologies.

Analysis and supporting documents used to determine the effect on small businesses

The existing rule requirements are in place and these proposed changes are minimal to current practices therefore there is no impact anticipated to small businesses. No economic impact report has been requested.

Small Business Impact

The proposed rule changes are not expected to have a significant effect on small business. There are no significant changes to these rules that would affect small businesses.

Pursuant to s. 227.114, Stats., it is not anticipated that the proposed rule will have an economic impact on small businesses.

Environmental Analysis

The Department has made a preliminary determination that this action does not involve significant adverse environmental effects and does not need an environmental analysis under ch. NR 150, Wis. Adm. Code.

Fiscal Estimate

Assumptions used in arriving at fiscal estimate

This rule revision requires submittal of an electronic version of all plans and specifications, and the electronic submittal of discharge monitoring reports and web-based wastewater permit applications by all Wisconsin Pollutant Discharge Elimination System (WPDES) permittees.

Permittees are now required to submit monthly discharge operating reports as part of their WPDES permit requirements. A few WPDES permittees may incur some one-time costs to comply with the electronic form submittal requirements, but the requirements will also provide significant annual cost savings for the Department.

I. STATE FISCAL EFFECT

Cost savings associated with the electronic submission of forms are summarized as follows:

- A. Printing cost savings of \$6,300 for no longer having to process 100,000 double-sided pages of monthly discharge monitoring reports.
- B. LTE cost savings of \$22,900 (1040 hours x \$22/hr = \$22,880) for no longer having to review the quality control of the documents before sending them to the third-party contractor that converts paper copy submittals to the Department's electronic database.
- C. Contractual savings of \$45,000 for no longer needed to contract with a third-party entity for paper-to-electronic information conversion.
- D. Postage savings of \$6,000.
- E. LTE cost savings of \$22,900 (1040 hours x \$22/hr = \$22,880) for no longer having to scan WPDES facility plans and specifications to electronic copies for our database.

In total, annual cost savings are estimated to be \$103,100. State expenditures for staff will not increase to cover the program revisions, and there will be no reduction in state revenues associated with state cost decreases.

For Plans and Specification submittals, most facilities hire consultants to do this work and they should have a computer or they could scan the documents and submit a CD of the plans with their paper copy submittal. Minor costs may be passed on to the permittee for this additional service.

II. LOCAL GOVERNMENT FISCAL EFFECT

All municipal WPDES permittees (979) are currently submitting their Compliance Maintenance Annual Report (CMAR) electronically as part of NR 208; therefore, this rule change has no fiscal effect at the local government level.

III. PRIVATE SECTOR IMPACT

The proposed rule package would require all industrial permittees to submit monthly reports electronically to our database.

A. One-Time Costs

1. The Department estimates that 50 industrial permittees do not have a computer and will be required to incur one-time costs to buy a computer. Estimated costs for the computer are \$1,500 x 50 facilities = \$75,000.
2. Once the industrial permittees go on-line and begin electronic report submittals, the Department estimates that they will achieve overall postal cost savings of \$1,200 in the first year.

B. Annualized Costs

1. Annualized internet access costs for a new computer user to prepare electronic submittals are based on the estimated use per year: \$360 year/facility x 50 facilities = \$18,000.
2. Form completion costs should be the same as sending in a paper copy. It is estimated that it will take the same amount of time for the operator to fill

out an electronic submission as they spend on a paper copy.

State fiscal effect

Decrease costs.

Local government fiscal effect

None.

Fund sources affected

GPR, FED.

Agency Contact Person

Susan Sylvester
Phone: 608-266-1099
Fax: 608-267-2800
Email: Susan.Sylvester@wisconsin.gov

**Notice of Hearing
Public Instruction
EmR0936, CR 09-117**

NOTICE IS HEREBY GIVEN That pursuant to ss. 118.38 (2) (bm) and 227.11 (2) (a), Stats., the Department of Public Instruction will hold a public hearing as follows to consider emergency and proposed permanent rules creating section PI 8.01 (4), relating to waiver of school hours.

Hearing Information

The hearing will be held as follows:

<u>Date and Time</u>	<u>Location</u>
February 1, 2010 1:00 – 3:00 p.m.	Madison GEF 3 Building 125 South Webster Street Room 041

The hearing site is fully accessible to people with disabilities. If you require reasonable accommodation to access any meeting, please call Paul Sandrock, Director, Content and Learning, (608) 267-3726 or leave a message with the Teletypewriter (TTY) at (608) 267-2427 at least 10 days prior to the hearing date. Reasonable accommodation includes materials prepared in an alternative format, as provided under the Americans with Disabilities Act.

Copies of Rule and Contact Person

The administrative rule and fiscal note are available on the internet at <http://dpi.wi.gov/pb/rulespg.html>. A copy of the proposed rule and the fiscal estimate also may be obtained by sending an email request to lori.slauson@dpi.wi.gov or by writing to:

Lori Slauson, Administrative Rules and Federal Grants
Coordinator
Department of Public Instruction
125 South Webster Street
P.O. Box 7841
Madison, WI 53707

Submission of Written Comments

Written comments on the proposed rules received by Ms. Slauson at the above mail or email address no later than February 5, 2010, will be given the same consideration as testimony presented at the hearing.

**Analysis Prepared by Department of Public Instruction
Statute interpreted**

Sections 115.01 (10) (a) 2. and 3. and 118.38 (2) (bm), Stats.

Statutory authority

Sections 118.38 (2) (bm) and 227.11 (2) (a), Stats.

Explanation of agency authority

Section 118.38 (2) (bm), Stats., requires the department to promulgate rules establishing criteria for waiving the requirement to schedule at least the number of hours of direct pupil instruction specified under s. 121.02 (1) (f) 2., Stats., if school is closed by order of a local health officer, department of health services, or school district administrator under s. 115.01 (10) (a) 2. or 3., Stats.

Section 227.11 (2) (a), Stats., gives an agency rule-making authority to interpret the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute.

Related statute or rule

Section 121.02 (1) (f) 2., Stats.

Plain language analysis

2009 Wisconsin Act 42 allows school boards to meet the 180 school day requirement by including the following in the definition of “school day”: 1) a school district administrator closing a school due to a threat to the health or safety of pupils or school personnel, unless the school board determines otherwise (this does not include days closed due to inclement weather) and 2) the department of health services (in addition to a local health officer) closing a school.

Notwithstanding these provisions, a school board must still provide the required number of instructional hours under s. 121.02 (1) (f) 2., Stats. Thus, the Act requires the department to promulgate rules establishing criteria for waiving the required number of hours of direct pupil instruction if a school is closed for either reason stated above.

As required in the Act, the proposed rules will establish criteria for waiving the requirement to schedule at least the number of hours of direct pupil instruction specified under s. 121.02 (1) (f) 2., Stats., to address either of the above scenarios.

Comparison with federal regulations

None.

Comparison with rules in adjacent states

Illinois, Iowa, Michigan, and Minnesota do not have rules relating to school hours or waiving of school hours.

Summary of factual data and analytical methodologies

The information required in the rule is typical of information requested from school districts that have requested waivers from the school hour standard requirement under s. 121.02 (1) (f) 2., Stats.

Analysis and supporting documents used to determine effect on small business

N/A.

Anticipated costs incurred by private sector

N/A.

Small Business Impact

The proposed rules are not anticipated to have a fiscal effect on small businesses as defined under s. 227.114 (1) (a), Stats.

Fiscal Estimate

Summary

The proposed rules establish criteria for waiving the requirement to schedule at least the number of hours of direct pupil instruction specified under s. 121.02 (1) (f) 2., Stats., if a school is closed by a school district administrator, the Department of Health Services, or the local health officer under s. 115.01 (10) (a) 2. or 3., Stats.

State fiscal effect

The costs associated with administering requests for these waivers will be absorbed by the department.

Local government fiscal effect

School districts may, but are not required to, apply for a waiver for the required number of hours of direct pupil instruction. The application procedures should not have a fiscal effect. The fiscal effect on a district that receives an approved waiver is indeterminate.

Agency Contact Person

Deborah Mahaffey, Assistant State Superintendent
Division for Academic Excellence
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Notice of Hearing

Tourism CR 09–111

NOTICE IS HEREBY GIVEN That pursuant to ss. 41.16 and 227.11 (2), Stats., the Department of Tourism will hold a public hearing on the proposed rule order to create Chapter Tour 3 relating to grants to municipalities and organizations for regional tourist information centers created under 2009 Wisconsin Act 28.

Hearing Information

Date: February 1, 2010
Time: 10:00 a.m.
Location: 201 West Washington Avenue
1st Floor Human Resource Conf. Room
WHEDA Building
Madison, WI 53708

Submission of Written Comments

Interested persons are invited to present information at the hearing. Persons appearing may make an oral presentation but are also urged to submit facts, opinions and arguments in writing as well. Facts, opinions and arguments may also be submitted in writing, without a personal appearance, by mail addressed to: Laura Muenich, Department of Tourism, P.O. Box 8690, Madison, WI 53708–8690 or by email to lmuenich@travelwisconsin.com. Written comments must be received by 4:30 P.M. on February 10, 2010, to be included in the record of rule–making proceedings.

Copies of Proposed Rule

Copies of this proposed rule are available upon request to Laura Muenich, Budget & Policy Analyst, Department of Tourism, P.O. Box 8690, Madison, Wisconsin 53708–8690, or by email to lmuenich@travelwisconsin.com.

Analysis Prepared by the Department of Tourism

Statutes interpreted

Section 41.16 (3) (c), Stats.

Statutory authority

Sections 41.16 (3) (c), 227.17, Stats.

Explanation of agency authority

Section 41.16 (3) (c), Stats., requires the Department to promulgate rules to administer the grants under this section, including the preparation of an application form.

Related statute or Rule

There are no other statutes or rules other than those listed above.

Plain language analysis

Under the proposed rule, tourist information centers may apply for a grant to seek reimbursement to up to 50 percent of eligible costs. The proposed rule identifies the eligible costs, application procedures, contracts, and reporting requirements.

Comparison with federal regulations

The Department is not aware of any existing or proposed federal legislation on this matter.

Comparison with rules in adjacent states

The Department is not aware of any similar rules in surrounding states.

Summary of factual data and analytical methodologies

The proposed rule was developed by a Department workgroup comprised of the secretary, grant coordinator, customer services manager, and the budget and policy analyst. The group researched other states for applicable laws and rules relating to grants to regional tourist information centers for reimbursement of operating costs. The workgroup also reviewed the rules for the Joint JEM grants.

Analysis and supporting documents used to determine effect on small business

This proposed rule will not affect or impact adversely small businesses.

Section 227.137, Stats., requires an “agency” to prepare an economic impact report before submitting the proposed rule–making order to the Wisconsin Legislative Council. The Department of Tourism is not included as an “agency” in this section.

Small Business Impact

These proposed rules will have no effect on small businesses as defined in s. 227.114 (1), Stats.

Fiscal Estimate

2009 Wisconsin Act 28 created a grant to municipalities and organizations for regional tourist information centers. Eligible applicants may submit an application to request that the department reimburse the applicant for up to 50% of eligible costs incurred to operate a regional tourist information center. The rules will have no fiscal effect on the state.

Agency Contact Person

Laura Muenich, Budget and Policy Analyst
Department of Tourism — P.O. Box 8690
Madison, WI 53708–8690
Telephone: 608.261.8764
E–Mail: lmuenich@travelwisconsin.com

Notice of Hearing
Veterans Affairs
CR 09-091

NOTICE IS HEREBY GIVEN That pursuant to s. 45.40 (3m), Stats., and Chapter 227 of the Wisconsin Statutes, the Wisconsin Department of Veterans Affairs will hold a public hearing to consider the creation of section VA 2.01 (1) (u), (v), and (3) (d) to (g), Wis. Adm. Code, relating to the assistance to needy veterans grant program.

Hearing Information

<u>Date and Time:</u>	<u>Location:</u>
February 18, 2010 Thursday At 9:30 a.m.	Wis. Dept. of Veterans Affairs Board Room, 8th Floor 30 West Mifflin Street Madison, Wisconsin

The public hearing site is accessible to people with disabilities. If you have special needs or circumstances that may make communication or accessibility difficult at the hearing, please contact James A. Stewart at (608) 266-3733 or jimmy.stewart@dva.state.wi.us

Submission of Written Comments

Written comments may be submitted to James A. Stewart, 30 West Mifflin Street, P.O. Box 7843, Madison, WI 53707-7843. Phone: (608) 266-3733 E-Mail: jimmy.stewart@dva.state.wi.us.

Comments should be submitted no later than March 5, 2010.

Analysis Prepared by the Wisconsin Department of Veterans Affairs

Statute interpreted

Section 45.40, Stats.

Statutory authority

Section 45.40 (3m), Stats.

Explanation of agency authority

The department is charged with administering a grant program to assist needy veterans with health care. It provides eligible applicants with dental, hearing and vision care through private health care providers.

Related statute or rule

There is no related statute or rule.

Plain language analysis

The creation of VA 2.01 (1) (u) and VA 2.01 (1) (v) will establish a definition for the vision care assistance available under this program. The creation of VA 2.01 (3) (d), VA 2.01 (3) (e), VA 2.01 (3) (f), and VA 2.01 (3) (g) will establish program limitations for the aid offered through the program. The program is intended to provide health care assistance to those veterans who are not eligible for the federal assistance offered to veterans. The current program rules do not provide program limitations or direction for health care professionals in providing necessary services to eligible veterans. The creation of a definition for "vision care" and the creation of specific program limitations will allow veterans to receive a reasonable modicum of the benefits available to those veterans eligible for federal assistance. All care offered through the program will have monetary and frequency limitations imposed upon the available services.

Comparison with federal regulations

There is no current or pending federal regulation which would provide subsistence or health care aid for the eligible veterans under this program.

Comparison with rules in adjacent states

There are no similar rules in adjacent states.

Summary of factual data and analytical methodologies

Surveys of multiple private vendors of dental care services, hearing care services, and vision care services were undertaken to establish the definition of "vision care" and to establish the frequency and monetary limitations of each service. The United States Department of Veterans Affairs was also contacted to determine what services were offered through that agency and to review costing mechanisms used in the provision of each of the elaborated health care services.

Analysis and supporting documents used to determine effect on small business

No analysis was performed regarding an economic impact statement.

Small Business Impact

These rules do not appear to have any effect upon small businesses, nor any significant fiscal impact upon the private sector.

Fiscal Estimate

Assumptions used in arriving at fiscal estimate

The proposed administrative rule establishes the following provisions governing the grant program:

1. Limit "dental care" not to exceed \$1,400 every 5 years.
2. Limit "hearing care" not to exceed \$1,300 per ear every 4 years.
3. Establish "vision care" not to exceed \$400 per year.

Provisions of 2007 Wisconsin Act 20 eliminated caps for dental care, hearing care and vision care and increased the lifetime cap to \$7,500. Prior to those changes, the annual cap for dental care was \$2,500, \$1,500 per ear for hearing care and \$500 for vision care. The lifetime cap was \$5,000. The authorized funding for the 2007-09 biennium was \$1,492,000. Of that amount, expenditures in FY08 were \$1,277,700, which left a balance of \$214,300 to cover FY09 payments. As a result, the program was closed in October, 2008 (FY08-09 expenditures \$1,662,500); the provisions of Act 20 had increased the expenditures more than projected. The authorized funding for 2009-11 biennium is \$1,991,500. However, based on the proposed rule changes the estimated demand is \$1,493,500 (\$711,200+\$782,300) which would decrease expenditures by \$210,550 in FY10 and \$287,500 in FY11. Thus the projected biennial savings as a result of the proposed rule changes would be approximately \$498,000.

Please contact James A. Stewart, 30 West Mifflin Street, P.O. Box 7843, Madison, WI 53707-7843 or Phone: (608) 266-3733 or E-Mail: jimmy.stewart@dva.state.wi.us to request a copy of the fiscal estimate.

State fiscal effect

Decrease costs.

Fund sources affected

SEG.

Affected Ch. 20 appropriations

Section 20.485 (2) (vm), Stats.

Text of Proposed Rules

SECTION 1. VA 2.01 (1) (u) is created to read:

VA 2.01 (1) (u) "Vision care" means provision of one vision examination by a licensed health care provider and provision of corrective eyewear.

SECTION 2. VA 2.01 (1) (v) is created to read:

VA 2.01 (1) (v) "Change in refractive error" means an increase of sphere, cylinder and/or power of at least the following: Sphere Power of + or - .25 diopter; Cylinder Power of + or - .5 diopter; Axis Change of + or - .25 to .75 diopters at 5 degrees, + or - 1 to 2 diopters at 3 degrees or + or - 2.25 or more diopters at 2 degrees.

SECTION 3. VA 2.01 (3) (d) is created to read:

VA 2.01 (3) (d) A dental health care professional must indicate in writing that the dental procedures performed were directly necessary to dental care. Such procedures shall not exceed \$500.00 in any consecutive 12 month period except where a full or partial upper and / or a lower denture is required. The grant for such denture or dentures shall not exceed \$900 for one or \$1,400 for both in any consecutive 60 month period.

SECTION 4. VA 2.01 (3) (e) is created to read:

VA 2.01 (3) (e) Hearing care shall not exceed \$200.00 in any consecutive 12 month period except where a left and / or a right hearing aid is required. The grant for each hearing aid shall not exceed \$1,300 in any consecutive 48 month period. A participant may obtain a grant to fund an additional or a more costly hearing aid or set of hearing aids and a related examination, if a licensed audiological health care professional identifies, in writing, compelling medical circumstances which have required this added assistance.

SECTION 5. VA 2.01 (3) (f) is created to read:

VA 2.01 (3) (f) A grant for vision care shall not exceed \$400.00 in any consecutive 12 month period; however, a participant may obtain a grant for replacement glasses before 12 consecutive months have elapsed if the eyewear is prescribed because of a documented change in refractive error

SECTION 6. VA 2.01 (3) (g) is created to read:

VA 2.01 (3) (g) A participant may obtain a grant for an additional visit to a licensed vision care provider and for a more costly set of corrective eyewear or for an additional set of corrective eyewear where an optometrist or an ophthalmologist identifies in writing a compelling medical circumstance which has required this added assistance.

Agency Contact Person

James A. Stewart, Chief Legal Counsel
30 West Mifflin Street, P.O. Box 7843
Madison, WI 53707-7843
Phone: (608) 266-3733
Email: jimmy.stewart@dva.state.wi.us

Notice of Hearing**Veterans Affairs****CR 09-092**

NOTICE IS HEREBY GIVEN That pursuant to ss. 45.50 (1) (a), 45.03 (2) and 45.03 (4), Stats., and Chapter 227 of the Wisconsin Statutes, the Wisconsin Department of Veterans Affairs will hold a public hearing to consider the repeal of section VA 1.11 (8) and the amendment of section VA 1.11

(11), Wis. Adm. Code, relating to the duties and responsibilities of the secretary.

Hearing Information**Date and Time:****February 19, 2010**

Friday

At 9:45 a.m.

Location:

Wis. Dept. of Veterans Affairs

Board Room, 8th Floor

30 West Mifflin Street

Madison, Wisconsin

The public hearing site is accessible to people with disabilities. If you have special needs or circumstances that may make communication or accessibility difficult at the hearing, please contact James A. Stewart at (608) 266-3733 or jimmy.stewart@dva.state.wi.us

Submission of Written Comments

Written comments may be submitted to James A. Stewart, 30 West Mifflin Street, P.O. Box 7843, Madison, WI 53707-7843. Phone: (608) 266-3733 E-Mail: jimmy.stewart@dva.state.wi.us.

Comments should be submitted no later than March 5, 2010.

Analysis Prepared by the Wisconsin Department of Veterans Affairs***Statute interpreted***

Section 45.50 (1) (a), Stats.

Statutory authority

Sections 45.50 (1) (a), 45.03 (2) and (4), Stats.

Explanation of agency authority

The department is charged with operating skilled nursing facilities and employing supervisory personnel for these facilities. Skilled nursing facilities require administrators who have met state and federal standards and are licensed to operate a skilled nursing facility. The department has created the division of homes and an administrator to supervise the operation of these facilities. The board has determined as a matter of policy that all commandants and the division administrator should be licensed to operate skilled nursing facilities. The board has also determined that the Secretary should not be required to directly supervise the commandants since the division of homes and the attendant administrator position was created for that purpose.

Related statute or rule

Section 50.04 (2) (a), Wis. Stats., and s. DHS 132.41, Wis. Adm. Code. These laws require every skilled nursing facility within the state to operate under the supervision of an administrator licensed under Ch. 456, Wis. Stats.

Plain language analysis

The amendment of VA 1.11 (1) (a) will limit employment, after January 1, 2011, in the positions of commandant or administrator, division of homes to individuals who are licensed as skilled nursing home administrators by the State of Wisconsin or who obtain such licensure within 90 days of initiating employment in the position. The department believes that this requirement will provide better management and more accountability for the skilled nursing facilities. The repeal of VA 1.11 (8) will realign the direction of the commandants from direct supervision by the Secretary to direct supervision by the Administrator, Division of Homes.

Comparison with federal regulations

There is no current or pending federal regulation which would provide subsistence or health care aid for the eligible veterans under this program.

Comparison with rules in adjacent states

38 CFR 51.210 (2) (i) requires any skilled nursing facility receiving per diem payments from the United States Department of Veterans Affairs to be supervised by an administrator who is licensed by that state. 42 CFR 431.703 requires any skilled nursing facility receiving medical assistance (Medicaid) payments from the United States Department of Health and Human Services to be supervised by an administrator who is licensed by that state. Both skilled nursing facilities currently have administrators licensed as nursing home administrators within the management structure. The proposed rules will ensure that the senior official at all skilled nursing facilities operated by the department, as well as the Administrator, Division of Homes, are licensed in accordance with these requirements.

Illinois:

77 Ill. Admin. Code § 340.1370(a) (Illinois Veterans' Home Code)

(a) There shall be a full-time administrator licensed under the Nursing Home Administrators Licensing and Disciplinary Act for each licensed facility. The licensee will report any change of administrator to the Department, within five days.

Iowa:

Iowa Code § 35D.13(2) (Veterans Home)

2. The commandant shall be a resident of the state of Iowa who served in the armed forces of the United States and was honorably discharged, and is a licensed nursing home administrator.

Michigan:

MCL § 36.10 (Michigan's Veterans' Facility)

Sec. 10. The board of managers shall appoint a commandant for the home, who shall be an ex-officer, soldier, sailor, or marine, whose salary shall be such amount as shall be appropriated by the legislature, and who shall nominate, for the action of the board of managers, all necessary subordinate officers, who shall also be ex-officers, soldiers, sailors, or marines, who may be dismissed by the commandant for inefficiency or misconduct. In case of every removal, a detailed statement of the case shall be reported to the board of managers by the commandant. No member or former member of the board of managers shall be eligible to election or appointment as commandant of the facility until the expiration of at least 1 year from the date of the end of his term as member of the board of managers or the date of his resignation as such member.

Mich. Admin. Code R 325.20111(2) (Licensing of Nursing Homes)

(2) The governing body shall appoint a licensed nursing home administrator and shall delegate to the administrator the responsibility for operating the home in accordance with policies established by the governing body. An administrator and all other persons in supervisory positions shall be not less than 18 years of age.

Minnesota:

Minn. R. 9050.0030(A) (Veterans Homes)

The commissioner of veterans affairs shall ensure compliance by the facility and staff with applicable statutes, with applicable rules of the Minnesota Department of Health and the Minnesota Department of Human Services, and with

applicable health, safety, sanitation, building, zoning, and operations codes, including the following:

- A. Minnesota Department of Health licensure and operations requirements in chapters 4655 and 4660 and Minnesota Statutes, sections 144.50 to 144.56 and 144A.02 to 144A.10.

Minn. R. 4655.1200 (Boarding Care Homes)

Subpart 1. The licensee in each nursing home or boarding care home shall be responsible for its management, control, and operation.

Subp. 2. The licensee shall develop written bylaws and/or policies which shall be available to all members of the governing body and shall assume full legal responsibility for matters under its control, for the quality of care rendered and for compliance with applicable laws and rules of legally authorized agencies. The responsibilities of the licensee shall include:

- A. Full disclosure of each person having an interest of ten percent or more of the ownership of the home to the commissioner of health with any changes promptly reported in writing. In case of corporate ownership, the name and address of each officer and director shall be made known. If the home is organized as a partnership, the name and address of each partner shall be furnished. In the case of a home operated by a lessee, the persons or business entities having an interest in the lessee organization shall be reported and an executed copy of the lease agreement furnished. If the home is operated by the holder of a franchise, disclosure as specified above shall be made as to the franchise holder who shall also furnish an executed copy of the franchise agreement.
- B. Appointment of a licensed nursing home administrator or a person in charge who shall be responsible for the operation of the home in accordance with law and established policies.
- C. The authority to serve as administrator or person in charge shall be delegated in writing.
- D. The administrator of a hospital with a convalescent and nursing care unit may serve both units. See the Nursing Home Administrator Licensing Law, Laws of Minnesota 1969, chapter 770.
- E. Notification of the termination of service of the administrator or the person in charge as well as the appointment of a replacement shall be given within five days in writing to the commissioner of health by the governing body of the home. If a licensed nursing home administrator or person in charge of the boarding care home is not available to assume the position immediately, such notification to the commissioner of health shall include the name of the person temporarily in charge of the home. The governing body of a nursing home shall not employ an individual as the permanent administrator until it is determined that the administrator qualifies for licensure as a nursing home administrator in Minnesota. See the Nursing Home Administrator Licensing Law, Laws of Minnesota 1969, chapter 770.
- F. Provision of a competent staff and maintenance of professional standards in the care of patients and residents.
- G. Employment of qualified personnel. There shall be sufficient personnel to provide the basic services such

as food service, housekeeping, laundry, and plant maintenance. Employees or volunteers under 18 years of age shall be under direct supervision.

- H. Provision of facilities, equipment, and supplies for care consistent with the needs of the patients and residents.
- I. Provision of evidence of adequate financing, proper administration of funds, and the maintenance of required statistics.

Only a licensee is responsible for the management, control and operation of a nursing home.

Summary of factual data and analytical methodologies

The department commissioned a report on the operation of its skilled nursing facilities by an independent consulting group, Pathways Health Services, Inc. The report reviewed the supervision of both facilities, as well as the supervision provided by the Administrator, Division of Homes. The report identified issues ensuring compliance with health care requirements, interaction with health care inspectors and advocacy for appropriate budget and staffing based on the current organizational structure. The report made recommendations that all commandants and the Administrator, Division of Homes be licensed. The Board has also received testimony from a member of its Long Term Care Committee who is a licensed nursing home administrator in Wisconsin. The testimony identified similar concerns and concurred with the solutions offered in the Pathways report. The Board has adopted the recommendation related to commandants and the Administrator, Division of Homes being licensed as nursing home administrators.

Analysis and supporting documents used to determine effect on small business

No analysis was performed regarding an economic impact statement.

Small Business Impact

These rules do not appear to have any effect upon small businesses, nor any significant fiscal impact upon the private sector.

Fiscal Estimate

Assumptions used in arriving at fiscal estimate

The proposed amendment will require that any individual employed as a commandant or as the administrator for the division of the Wisconsin Veterans Homes (WVH), shall be licensed under chapter 456 of the Wisconsin Statutes or secure such licensure within 90 days of initiating employment. The proposed repeal will realign the direction of commandants from direct supervision by the secretary to direct supervision by the WVH's division administrator.

The proposed changes will have no fiscal effect on the department.

Please contact James A. Stewart, 30 West Mifflin Street, P.O. Box 7843, Madison, WI 53707-7843 or Phone: (608) 266-3733 or E-Mail: jimmy.stewart@dva.state.wi.us to request a copy of the fiscal estimate.

State fiscal effect

None.

Text of Proposed Rules

SECTION 1. VA 1.11 (1) is amended to read:

VA 1.11 (1) Employ a commandant~~s~~ for the Wisconsin veterans homes, designate an employee of the department as deputy secretary, and appoint such persons as may be necessary to carry out the functions of the department. Any individual employed as a commandant or as the administrator for the division of homes, after January 1, 2011, shall be licensed under Chapter 456 of the Wisconsin Statutes or secure such licensure within 90 days of initiating employment as a commandant or administrator of the division of homes.

SECTION 2. VA 1.11 (8) is repealed.

Agency Contact Person

James A. Stewart, Chief Legal Counsel
30 West Mifflin Street, P.O. Box 7843
Madison, WI 53707-7843
Phone: (608) 266-3733
EMail: jimmy.stewart@dva.state.wi.us

Submittal of Proposed Rules to the Legislature

Please check the Bulletin of Proceedings — Administrative Rules for further information on a particular rule.

Accounting Examining Board **CR 09-100**

A rule-making order to revise Chapters Accy 7 and 8, relating to granting certificates to applicants pursuant to an international mutual recognition agreement.

Architects, Landscape Architects, Professional Engineers, Designers and Land Surveyors Examining Board **CR 09-079**

A rule-making order to revise section A-E 3.05 (2), relating to entrance requirements to take the architect examination.

Corrections **CR 09-075**

A rule-making order to revise Chapter DOC 309, relating to inmate release accounts.

Health Services *Health, Chs. DHS 110—* **CR 09-085**

A rule-making order to revise Chapter DHS 163, relating to requirements for conducting lead-safe renovation activities in pre-1978 housing and child-occupied facilities, and affecting small businesses.

Health Services *Health, Chs. DHS 110—* **CR 09-089**

A rule-making order to revise Chapter DHS 124, relating to forfeitures, anatomical gifts, and automated external defibrillator (AED) training for hospitals.

Natural Resources *Fish, Game, etc., Chs. NR 1—* **CR 09-083**

A rule-making order revising Chapter NR 25, relating to commercial fishing in outlying waters and affecting small business.

Transportation **CR 09-041**

A rule-making order to revise Chapter Trans 206, relating to the local roads improvement program.

Rule Orders Filed with the Legislative Reference Bureau

The following administrative rule orders have been filed with the Legislative Reference Bureau and are in the process of being published. The date assigned to each rule is the projected effective date. It is possible that the publication date of these rules could be changed. Contact the Legislative Reference Bureau at bruce.hoesly@legis.wisconsin.gov or (608) 266-7590 for updated information on the effective dates for the listed rule orders.

Natural Resources

Fish, Game, etc., Chs. NR 1—

CR 08-023

Rule revises Chapter NR 46, relating to definitions, deadlines, and requirements related to Managed Forest Law. Effective 3-1-10.

Public Notices

Department of Health Services

Medicaid Reimbursement for Wisconsin's 1915(i) Community Recovery Services Psychosocial Rehabilitation State Plan Amendment

The State of Wisconsin intends to implement a HCBS 1915(i) state plan amendment that provides psychosocial rehabilitation services to support individuals with mental illness. There are three components of the service as described below.

- Community Living Supportive Services — services needed to allow consumers to live with maximum independence in community integrated housing.
- Supported Employment — assists consumers with acquiring and maintaining gainful employment.
- Peer/Advocate Supports — Peer Specialists function as role models demonstrating techniques in recovery and ongoing coping skills.

The Department is proposing to implement new rates for HCBS 1915(i) state plan amendment on January 15, 2010. The interim rates use a wage data methodology based on average wages provided by the Bureau of Labor Statistics. Final payments to counties will be based on certified public expenditures. County agencies will provide the non-federal share for these services. State statute 49.45 (30g) limits this program to county agencies that have elected to participate. County agencies may contract with other providers for these services. Those providers will be reimbursed at a rate specific to the county but derived from a uniform methodology.

Copies of the Proposed Change

A copy of the proposed change may be obtained free of charge at your local county agency or by calling or writing as follows:

Regular Mail

Division of Mental Health and Substance Abuse Services
PO Box 7851
Madison, WI 53707-7851

Phone

Joyce Allen
Bureau Director, Bureau of Prevention Treatment and Recovery
Division of Mental Health and Substance Abuse Services
(608) 266-1351

FAX

(608) 266-1533
Attention: Joyce Allen

E-Mail

Joyce.Allen@wisconsin.gov

A copy of the proposed change is available for review at the main office of any county department of social services or human services.

Written Comments

Written comments are welcome. Written comments on the proposed change may be sent by FAX, e-mail, or regular mail to the Division of Mental Health and Substance Abuse Services. The FAX number is (608) 266-1533. The e-mail address is Joyce.Allen@wisconsin.gov. Regular mail can be sent to the above address. All written comments will be reviewed and considered.

All written comments received will be available for public review between the hours of 7:45 a.m. and 4:30 p.m. daily in Room 850 of the State Office Building, 1 West Wilson Street, Madison, Wisconsin. Revisions may be made based on comments received.

Notice of Nonacquiescence

**STATE OF WISCONSIN
TAX APPEALS COMMISSION**

ERIN, LLC,

Petitioner,

:

v.

:

Docket No. 08-T-122

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

:

Pursuant to section 73.01 (4) (e) 2. of the Wisconsin Statutes, the Respondent hereby gives notice that, although it is not appealing the decision or order of the Tax Appeals Commission rendered in the above-captioned matter under date of December 4, 2009, it has adopted a position of nonacquiescence in regard to that decision or order. The effect of this action is that, although the decision or order is binding on the parties for the instant case, the Commission's conclusions of law, the rationale and construction of statutes in the instant case are not binding upon or required to be followed by the Respondent in other cases.

Dated at Madison, Wisconsin this 4th day of January, 2010.

WISCONSIN DEPARTMENT OF REVENUE

By _____
 Roger M. Ervin
 Secretary of Revenue

The State of Wisconsin
Department of Administration
Bureau of Document Services
Document Sales and Distribution Section
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